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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1111~~. 763

DAVID K. HILL, PLAINTIFF IN ERROR,

vs.

MARY J. SUMNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED SEPTEMBER 20, 1888.

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SUPREME COURT OF THE UNITED STATES.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 27th day of August, A. D. 1886, came Messrs. Patterson & Thomas, attorneys, and filed in said court a transcript of proceedings therebefore had in the district court of the second judicial district of the State of Colorado, sitting within and for the county of Arapahoe, in a certain suit in said district court then pending, wherein Mary J. Summer was plaintiff and David K. Hill was defendant; and the said transcript is in words and figures as follows, to wit:

Transcript from District Court, Arapahoe County.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

District Court, Arapahoe County.

Pleas in the district court of Arapahoe county, State of Colorado, before the Honorable Victor A. Elliot, judge of the second judicial district of said State, at a term thereof begun and held at the court-house, in Denver, in said county, on the third Tuesday (it being the 20th day) of April, A. D. one thousand eight hundred and eighty-six. 2

Present: Honorable Victor A. Elliot, judge of the district court of the second judicial district of the State of Colorado; Ledru R. Rhodes, Esq., district attorney of said district; Fredrick Cramer, Esq., sheriff of said county; William Newell, Esq., clerk of said court.

MARY J. SUMNER *vs.* DAVID K. HILL.

Be it remembered that heretofore and on, to wit, the 24th day of April, A. D. 1886, came said plaintiff, by L. C. Rockwell, Esq., her attorney, and filed herein her complaint, affidavit, and bond in attachment.

And said complaint is in words and figures as follows, to wit:

Complaint.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

In the District Court of the Second Judicial District of the State of Colorado within and for the County of Arapahoe.

3 MARY J. SUMNER, Plaintiff, *vs.* DAVID K. HILL, Defendant.

Plaintiff, for cause of action against defendant, complains and alleges—

First. That on the 12th day of February, 1880, Edward R. Sumner sold and conveyed an undivided one-eighth interest in and to the Buckeye Lode mining claim and premises, situate on Fryer hill, in California mining district, Lake county, Colorado, to the defendant, David K. Hill, for the sum of $10,000, said defendant then and there paying in cash on said purchase the sum of $1,308.43; that on the day and date last aforesaid and at the time of said conveyance said Hill made, signed, sealed, and delivered to said Edward R. Sumner a certain instrument in writing to the effect reciting—

1st. That Edward R. Sumner has this day sold to me (Hill) the one undivided one-eighth part of the Buckeye lode, vein, mine, and deposit, situate on Fryer hill, in California mining district, Lake county, in the State of Colorado, for the sum of $10,000, of which $1,308.43 being cash in hand paid, the receipt of which is acknowledged by said Sumner.

2nd. That said Hill is to pay all the expenses for and on behalf of another undivided one-eighth part of said Buckeye lode owned by Edward H. Sumner accrued since the first day of Feb-
4 ruary, 1880, and which might thereafter accure for sinking a
shaft upon said mine and for all machinery purchased in sinking said shaft and in operating the same until pay mineral should have been reached.

3rd. To pay on behalf of Edward R. Sumner, for the benefit of Edward H. Sumner, the one-eighth part of the expenses for litigation regarding the title and possession of said Buckeye lode for trespasses which may be committed upon said property from and after the 12th day of February, 1880.

4th. To pay one-eighth part of all other assessments, taxes, and expenses upon said undivided eighth so owned by said Edward H. Sumner which might accrue against said property and properly paid by said one-eighth interest owned by said Edward H. Sumner, all of which sums of money should be endorsed as a credit upon the purchase price of said property.

5. After crediting all such sums of money so paid by Hill upon the purchase price of $10,000 the balance of such purchase price was to be paid out of the first production of said Hill's interest in said mine so soon as the same shall be realized therefrom; and if at any time said Hill shall dispose of or sell the one-eighth part of said mining property, then and in that case the said residue of said $10,000 shall become immediately due and payable to said Edward R. Sumner or his order, but in no case was said Hill to pay more than $10,000 on behalf of said one-eighth interest owned by said Edward H. Sumner.

Second. Plaintiff further represents and shows that on the
5 12th day of February, 1880, at the time said contract was
signed and delivered, the owners of said Buckeye lode were working the same with a view of developing the property, and were mining, extracting, and taking ore therefrom; that said claim had been so worked for over 12 months immediately previous to said last-named day and date, and it was the intention of said Edward R. Sumner and said David K. Hill that said mine should be worked continuously and with reasonable diligence by said Hill until enough

money was realized from Hill's interest in said property to pay the balance of said purchase-money.

Third. Plaintiff further represents and shows that on or about the 15th day of January, 1881, said Hill ceased working said property and shut the mine down and kept the same idle and unworked from the day and date last aforesaid until in or about the month of October, 1885, saving and excepting a period of about 11 months during the year 1883.

Fourth. Plaintiff further alleges that about the month of October, 1885, said Hill, in writing, leased and demised all his right, title, and interest in and to said Buckeye Lode mining claim and premises to one George A. Jenks for a period of more than one year then next following the last-named day and date; that by means of said leasing said Hill has disposed of the one-eighth part of said mining property in said Buckeye lode so as aforesaid conveyed by him to said Edward R. Sumner, and the balance of said $10,000 purchase-money for said one-eighth interest is now due and owing from said Hill to said plaintiff, less the sum of $3,919.94, which has been from
time to time paid on said contract by said Hill up to the 10th
6 day of October, 1883, leaving a balance due on that date on
said contract of $6,080.06, together with interest on the last-named sum until this time at the rate of ten per cent. per annum.

Fifth. Plaintiff further represents and shows that by the terms of said contract the purchase-money was to be paid under said contract to said Edward R. Sumner or his assigns within a reasonable time then next following the making of said contract, which was on the 12th day of February, 1880; that a reasonable time for the payment of said money has long since passed, to wit, that it expired prior to the 10th day of October, 1883, and defendant has failed, neglected, and refused to pay any part or portion of said $10,000 purchase-money, saving and excepting the sum of $3,919.94, which he paid from time to time prior to the 10th day of October, 1883; that the sum of $6,080.06 has been due and owing from said Hill to said plaintiff ever since the last-named day and date, with interest thereon at the rate of 10% per annum.

Sixth. Plaintiff further represents and shows that after said Hill obtained the conveyance of said one-eighth interest from said Edward R. Sumner and delivered said contract to him, to wit, on or about the 15th day of January, 1881, said Hill ceased working said property and shut the mine down and kept the same idle and unworked from the day and date last aforesaid until in or about the month of October, 1885, saving and excepting a period of about 11 months during the year 1883; that, by means of such failure and
neglect to work said mine and by keeping the same idle, said
7 Hill became liable to pay plaintiff the balance due on said
purchase-money specified in said contract, to wit, the sum of $6,080.06, with interest on that sum from the 10th day of October, 1883, until the present time, at the rate of ten per cent. per annum.

Seventh. Plaintiff further represents and shows that afterwards and on the 12th day of March, 1883, said Edward R. Sumner, for a good and valuable consideration, sold, assigned, transferred, and set over unto Mary J. Sumner, plaintiff herein, all his right, title, and interest in and to said contract so as aforesaid made between said defendant Hill and said Edward R. Sumner on the 12th day of February, A. D. 1880.

Wherefore plaintiff demands judgment against said defendant for the sum of $7,600, with interest on that sum from the 10th day of April, 1886, until the day of the rendition of judgment in this cause, and for her costs of suit.

(Signed) L. C. ROCKWELL,
Att'y for Pl'ff.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

Mary J. Sumner, of lawful age, being first duly sworn, on oath deposes and says that she is the plaintiff in this action; that she has read said complaint and knows the contents thereof, and that 8 the matters and things therein alleged are true of her own knowledge, except as to the matters therein stated on information and belief, and as to those she believes it to be true.

(Signed) MARY J. SUMNER.

Subscribed and sworn to before me this 20th day of April, 1886.
[SEAL.] (Signed) HARRY CARR,
Notary Public.

[Endorsed:] No. 7876. In the district court of Arapahoe county. Mary J. Sumner, plaintiff, *vs.* David K. Hill, defendant. Complaint. Filed April 20th, 1886. William Newell, clerk, by G. S. Richards, deputy. L. C. Rockwell, att'y for p'ff.

And the said affidavit for attachment is in words and figures as follows, to wit:

9 *Affidavit.*

STATE OF COLORADO,
County of Arapahoe, } *ss:*

In the District Court of the Second Judicial District of the State of Colorado, Sitting within and for the County of Arapahoe.

MARY J. SUMNER, Plaintiff, *vs.* DAVID K. HILL, Defendant.

Mary J. Sumner, of lawful age, being first duly sworn according to law, on oath deposes and says that she is the plaintiff in this action; that the defendant, David K. Hill, against whom the plaintiff is about to sue out a writ of attachment, is not a resident of the State of Colorado; that said defendant is justly indebted to the plaintiff in the sum of seven thousand six hundred dollars, no part or portion of which has been paid, but the whole thereof now remains due and unpaid, although payment thereof has often been demanded by this plaintiff; that said indebtedness arises upon a

contract for the direct payment of money made between Edward R. Sumner and the defendant, David K. Hill, on or about the 12th day of February, 1880, by the terms of which written agreement
10 said Edward R. Sumner conveyed to said Hill an undivided one-eighth interest in and to the Buckeye Lode mining claim and premises, situate on Fryer hill, in California mining district, Lake county, Colorado, for which said Hill was to pay the sum of $10,000, and upon which sum he then and there paid the sum of $1,308.43; that since the making of said contract various amounts have been paid thereon by the said Hill, until now there remains due the plaintiff from said Hill and unpaid the sum of $7,600.

Affiant further states that said action of herself as plaintiff against said David K. Hill, defendant, is now pending and undetermined in said district court of Arapahoe county, Colorado; that summons has been issued in said action, but has not been served.

Affiant further states that all the right, title, and interest of said Edward R. Sumner has been duly assigned to this affiant, and she is now the holder and owner of said contract.

Wherefore affiant asks that a writ of attachment may issue in aid of said action for the sum of $7,600; and further affiant says not.

(Signed) MARY J. SUMNER.

Subscribed and sworn to before me this 22nd day of April, 1886.

[SEAL.] (Signed) HARRY CARR,
Notary Public.

[Endorsed:] No. 7876. In the district court of Arapahoe county. Mary J. Sumner, plaintiff, *vs.* David K. Hill, defendant. Affidavit of attachment. Filed in district court, Arapahoe Co., Colo.,
11 Apr. 24, 1886. William Newell, clerk. L. C. Rockwell, att'y for pl'ff.

And said bond is in words and figures as follows, to wit:

Bond.

Know all men by these presents that we, Mary J. Sumner, as principal, and Edward R. Sumner and Lewis C. Rockwell, all of the city of Denver, county of Arapahoe, and State of Colorado, as sureties, are held and firmly bound unto David K. Hill in the penal sum of fifteen thousand five hundred dollars, lawful money of the United States; to the payment of which, well and truly to be made, we bind and each of us do hereby bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of April, A. D. 1886.

The condition of the above obligation is such that whereas the above-bounded Mary J. Sumner has, on the day of the date hereof, prayed an attachment out of the district court of the second judicial district of the State of Colorado, sitting within and for the county of

Arapahoe, at the suit of herself as plaintiff against David K. Hill, defendant, to recover from said Hill the sum of seven thousand and six hundred dollars:

Now, therefore, if the said defendant, David K. Hill, recover judgment in said action, or if the court shall finally decide the plaintiff was not entitled to an attachment and the said plaintiff will 12 pay or cause to be paid all damages and costs which said defendant may sustain by reason of said attachment if the same is wrongfully obtained, then the above obligation shall be void; otherwise it shall remain in full force and effect.

(Signed) MARY J. SUMNER. [SEAL.]
EDWARD R. SUMNER. [SEAL.]
LEWIS C. ROCKWELL. [SEAL.]

STATE OF COLORADO,
County of Arapahoe, } *ss:*

Lewis C. Rockwell, of lawful age, being first duly sworn, on oath says he is one of the sureties named in the above and foregoing undertaking; that he is worth the sum of fifteen thousand five hundred dollars over and above all his just debts and liabilities in property within the State of Colorado subject to levy and sale under execution; and further deponent says not.

(Signed) LEWIS C. ROCKWELL.

Subscribed and sworn to before me this 23rd day of April, 1886.

[SEAL.] (Signed) HARRY CARR,
Notary Public.

13 STATE OF COLORADO,
County of Arapahoe, } *ss:*

Edward R. Sumner, of lawful age, being first duly sworn according to law, on oath deposes and says he is one of the sureties named in the foregoing bond; that he is worth the sum of ——, over and above all his just debts and liabilities, in property within the State of Colorado subject to levy and sale under execution.

—— ——.

Subscribed and sworn to before me this — day of April, 1886.

—— ——.
Notary Public.

Endorsed: No. 7876. In the district court of Arapahoe county. Mary J. Sumner, plaintiff, *vs.* David K. Hill, defendant. Bond in attachment. Approved and filed this 24th day of April, A. D. 1886. William Newell, clerk, by G. S. Richards, deputy. L. C. Rockwell, att'y for pl'ff.

And afterwards and on, to wit, the 24th day of April, A. D. 1886, came said plaintiff, by Lewis C. Rockwell, Esq., her attorney, and filed herein her affidavit and order for publication of summons.

And said affidavit is in words and figures as follows, to wit:

14 *Affidavit for Publication.*

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the District Court within and for said County.

MARY J. SUMNER, Plaintiff, *vs.* DAVID K. HILL, Defendant.

Mary J. Sumner, of lawful age, being first duly sworn, on oath deposes and says she is the plaintiff in the above-entitled action; that the complaint in said action has been filed in the office of the clerk of this court, and summons has been issued thereon but not served upon said defendant; that said action is brought to recover the sum of seven thousand six hundred dollars, money due from the defendant to the plaintiff, with interest on that sum from the 10th day of April, 1886, at the rate of ten per cent. per annum, which said indebtedness arises upon a certain contract in writing made and entered into between the defendant and Edward R. Sumner on or about the 12th day of February, 1880, of and concerning the Buckeye Lode mining claim and premises, situate on Fryer hill, in California mining district, Lake county, Colorado, in and by which contract said Hill purchased of said Edward R. Sumner an undivided one-eighth interest in said Buckeye lode 15 for the sum of $10,000, which contract has been duly assigned to the plaintiff by said Edward R. Sumner.

Affiant further says that the defendant, David K. Hill, is a resident of the city of Chicago, Illinois, and is engaged in business in said city at Clark and Madison streets; that the person upon whom service of summons is to be made in this action resides out of the State of Colorado; that the defendant against whom this action is brought is a necessary and proper party to the action; that deponent has a good cause of action in this suit against said defendant, as will more fully appear by the complaint filed herein, to which reference is hereby made.

(Signed) MARY J. SUMNER.

Subscribed and sworn to before me this 24th day of April, 1886.

HARRY CARR,
Notary Public.

Endorsed: 7876. In the district court of Arapahoe county. Mary J. Sumner, plaintiff, *vs.* David K. Hill, defendant. Affidavit of Mary J. Sumner for publication of summons. Filed in district court April 24, 1886. William Newell, clerk. L. C. Rockwell, att'y for pl'ff.

16 And said order for publication of summons is in words and figures as follows, to wit:

Order for Publication.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

In the District Court within and for said County.

MARY J. SUMNER, Plaintiff, *vs.* DAVID K. HILL, Defendant.

Upon reading and filing the affidavit of Mary J. Sumner in this cause, and it satisfactorily appearing therefrom to me, the clerk of the district court of the county of Arapahoe and State of Colorado, that the defendant, David K. Hill, resides out of this State; and it further appearing from the affidavit aforesaid that a good cause of action exists in this action in favor of the plaintiff therein and against said defendant, David K. Hill, and that said defendant is a necessary and proper party to this suit; and it further and in like manner satisfactorily appearing to me that the place of business of said defendant is known to be at Clark and Madison streets, in the city of Chicago, in the State of Illinois—

It is ordered that the service of summons in this cause be made by publication in the Weekly Denver Times, a newspaper
17 published in the city of Denver, Arapahoe county, Colorado, for four consecutive weeks, which said newspaper is hereby designated as most likely to give notice to the defendant to be served in said action; that said publication shall be made at least once a week for four successive weeks; that a true and correct copy of said summons be forthwith deposited in the post office at Denver, Colorado, directed to said defendant, David K. Hill, at his said place of business, Clark and Madison streets, in the city of Chicago, in the State of Illinois, with the postage fully prepaid thereon.

Denver, April 24, 1886.

(Signed) WILLIAM NEWELL, *Clerk,*
By G. S. RICHARDS, *Deputy.*

Endorsed: No. 7876. In the district court of Arapahoe county. Mary J. Sumner, plaintiff, *vs.* David K. Hill, defendant. Order for publication of summons. Filed in district court, Arapahoe county, Colo., Apr. 24th, 1886. William Newell, clerk.

And afterwards and on, to wit, the 6th day of May, A. D. 1886, came said plaintiff, by L C. Rockwell, Esq., her attorney, and filed herein her summons.

And said summons is in words and figures as follows, to wit:

Summons.

STATE OF COLORADO,
State of Colorado, } *ss:*

18 In the District Court of the Second Judicial District of the State of Colorado within and for the County of Arapahoe.

MARY J. SUMNER, Plaintiff, *vs.* DAVID K. HILL, Defendant.

The people of the State of Colorado send greeting to the above-named defendants:

You are hereby summoned and required to answer the complaint in this action which is filed in the office of the clerk of the district court of the second judicial district of the State of Colorado, in and for the county of Arapahoe, on the second Monday after service hereof if served within the county, or if served out of this county but within this judicial district, then on the third Monday thereafter, or if served out of this judicial district but within the State of Colorado, then on the fifth Monday thereafter. If you fail to answer the complaint within that time judgment will be taken against you according to the prayer of the complaint; and you are hereby notified to serve a copy of your answer on the undersigned at his office, in Denver, Arapahoe county, in the State of Colorado, on or be-
19 fore the time prescribed by law for filing your answer in this cause. This action is brought to recover the sum of $7,600, money due from the defendant to the plaintiff, with interest on that sum from the 10th day of April, 1886, at the rate of ten per cent. per annum, which said indebtedness arises upon a certain contract made and entered into between the defendant and Edward R. Sumner on or about the 12th day of February, 1880, of and concerning the Buckeye Lode mining claim and premises, situate on Fryer Hill, in California mining district, Lake county, Colorado, and in and by which contract said Hill purchased of said Sumner an undivided one-eighth interest in said Buckeye lode for the sum of $10,000, which said contract was duly recorded in the office of the clerk and recorder of said Lake county, in Book 28, page 287, on the 6th day of March, 1880, and for her costs of suit.

(Signed) L. C. ROCKWELL,
Att'y for Plaintiff.

Office, No. 39 Opera House block, Denver, Colorado.

STATE OF ILLINOIS,
County of Cook, City of Chicago, } *ss:*

William H. Gleason, of lawful age, being first duly sworn according to law, on oath deposes and says he is not a party to the within-entitled action; that he has duly served the within summons this 1st day of May, 1886, upon the within-named defendant, David K.

Hill, by delivering a true and correct copy of said summons 20 and the complaint in this cause to said David K. Hill, at the place of business of said Hill, at Clark and Madison streets, in the city of Chicago, county of Cook and State of Illinois; and further deponent says not.

(Signed) WILLIAM H. GLEASON,
Deputy Sheriff, Cook County, Illinois.

Subscribed and sworn to before me this 1st day of May, 1886.

[SEAL.] (Signed) SETH F. HANCHETT,
Notary Public.

Endorsed: No. 7876. In the district court of Arapahoe county. Mary J. Sumner, plaintiff, *vs.* David K. Hill, defendant. Summons. Filed in district court, Arapahoe Co., Colo., May 6, 1886. William Newell, clerk. L. C. Rockwell, att'y for pl'ff.

And afterwards and on, to wit, the 29th day of May, A. D. 1886, came said defendant, by Messrs. Patterson and Thomas, and filed herein his demurrer.

And said demurrer is in words and figures as follows, to wit:

Demurrer to Complaint.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

21 In the District Court of the Second Judicial District of Colorado in and for said County.

MARY J. SUMNER, Plaintiff, *vs.* DAVID K. HILL, Defendant.

Comes now the above defendant, by Patterson and Thomas, his attorneys, and demurs to the plaintiff's complaint herein, and for his reasons says—

First. Said complaint does not state facts sufficient to constitute a cause of action against the defendant.

(Signed) PATTERSON AND THOMAS,
Attorneys for Defendant.

Endorsed: No. 7876. District court, Arapahoe Co. Mary J. Sumner *vs.* David K. Hill. Demurrer to complaint. Filed in district court, Arapahoe Co., Colo., May 29, 1886. William Newell, clerk. Patterson and Thomas, def't's att'ys.

And afterwards and on, to wit, the 22nd day of June, A. D. 1886, came said defendant, by Messrs. Patterson and Thomas, and filed herein his petition and bond for the removal of said cause to the circuit court; and said petition is in words and figures as follows, to wit:

22 *Petition.*

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the District Court of the Second Judicial District in and for said County.

MARY J. SUMNER *vs.* DAVID K. HILL.

The petition of the above-named defendant respectfully represents that your petitioner is and was at the time of the commencement of this action a citizen of the city of Chicago, county of Cook, and State of Illinois.

2nd.

That the plaintiff is and was at the time of the commencement of this action a citizen of Denver, county of Arapahoe, and State of Colorado.

3d.

That the amount involved in this controversy exceeds, exclusive of costs, the sum of five hundred dollars.

4th.

Your petitioner further avers that the said suit was instituted by the plaintiff against this defendant on, to wit, the 10th day of
23 April, 1886, and that the plaintiff claims that the defendant is indebted to her in the sum of seven thousand six hundred dollars by reason of a breach of a certain contract made and entered into between said parties of and concerning the interest of one Edward R. Sumner in the Buckeye Lode mining claim, situate in California mining district, county of Lake, and State of Colorado, and for the purchase of said interest, said contract having been entered into on, to wit, the 12th day of February, 1880, and by the said Edward R. Sumner assigned to the plaintiff before the commencement of this action.

5th.

Your petitioner further alleges that he is desirous of removing this cause to the circuit court of the eighth judicial circuit of the United States in and for the district of Colorado, sitting at Denver, in said district, under and in pursuance of the act of Congress dated March, 1875, concerning removals; and he presents herewith a bond, conditioned according to law, for the purpose of said removal, and prays that this honorable court will make an order transferring said cause pursuant to the statute in such case made and provided, and take no further step therein or of or concerning the same; and, — in duty bound, your petitioner will ever pray.

(Signed) PATTERSON AND THOMAS,
Attorneys for Defendant.

24 Endorsed: 7876. District court, Arapahoe county. Mary J. Sumner *vs.* David K. Hill. Petition of defendant for removal. Filed in the district court, Arapahoe Co., Colo., June 22nd, 1886. William Newell, clerk. Patterson and Thomas, attorneys for defendant.

And said bond is in words and figures as follows, to wit:

Bond on Removal.

State of Illinois,
County of Cook, City of Chicago, } *ss:*

Know all men by these presents that I, David K. Hill, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, C. S. Thomas, of the city of Leadville, State of Colorado, my true and lawful attorney, for me and in my name, place, and stead to sign and affix my name to a bond or petition asking for the removal of the case of Mary J. Sumner *vs.* David K. Hill from the State court to the United States court, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming—that my said attorney or his substitute
25 shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 2nd day of June, in the year one thousand eight hundred and eighty-six.

(Signed) DAVID K. HILL. [SEAL.]

Executed and delivered in the presence of—
SIMEON W. KING.

State of Illinois,
County of Cook, City of Chicago, } *ss:*

I, Simeon W. King, a commissioner of deeds for the State of Colorado, duly apppointed by the Governor thereof, residing at Chicago, in the county of Cook and State of Illinois, do hereby certify that David K. Hill, who is personally known to me to be the same person whose name is subscribed to the foregoing power of attorney as the party thereto, appeared before me this day in person and acknowledged that he executed the same for the uses and purposes therein set forth.

Witness my hand and official seal this second day of June, A. D. 1886.

[SEAL.] (Signed) SIMEON W. KING,
A Commissioner of Deeds for the State of Colorado,
Residing at Chicago, in the County of Cook and State of Illinois.

26 STATE OF COLORADO,
County of Arapahoe, } *ss:*

In the District Court of the Second Judicial District in and for said County.

MARY SUMNER *vs.* DAVID K. HILL.

Know all men by these presents that we, David K. Hill, by Charles S. Thomas, his attorney-in-fact, thereunto authorized, as principal, and Thomas M. Patterson, as surety, are held and firmly bound unto Mary J. Sumner in the sum of five hundred dollars ($500), lawful money of the United States; for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 21st day of June, 1886.

Whereas a suit was brought on or about the 10th day of April, 1886, in the district court of the second judicial district in and for the county of Arapahoe by the said Mary J. Sumner against the said David K. Hill, and the same is now pending for trial in said court, at Denver, and is removable to the circuit court of the United States for the district of Colorado, in the eighth circuit, 27 under the act of Congress approved March 3rd, 1875, concerning the removal of causes;

And whereas the said David K. Hill has filed his petition in said district court of Arapahoe county for the removal of said suit into the next circuit court of the United States to be held in the said district:

Now, therefore, the condition of the above obligation is such that if the above-bounden David K. Hill or his legal representatives shall enter or cause to be entered into the circuit court of the United States for the district of Colorado, on the first day of its stated session next ensuing after the order of said district court of Arapahoe for the removal of said suit into said circuit court, a copy of the record therein, and shall pay all costs that may be awarded by said circuit court if it shall hold that this suit has been wrongfully or improperly removed thereto, and shall do or cause to be done such other appropriate acts as by the said act of Congress of March 3rd, 1875, are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and effect.

(Signed) DAVID K. HILL, [SEAL.]
By C. S. THOMAS, [SEAL.]
His Attorney-in-Fact.
THOMAS M. PATTERSON. [SEAL.]

28 STATE OF COLORADO,
County of Arapahoe, } *ss:*

Thomas M. Patterson, the surety in the foregoing obligation named, being first duly sworn, deposes and says that he is a resident of the State of Colorado and a householder therein, and is worth the sum of one thousand dollars over all his just debts and liabilities exclusive of property exempt by law from execution.

(Signed) THOMAS M. PATTERSON.

Subscribed and sworn to before me this 22 day of June, 1886.

[SEAL.] H. J. BAILEY,
Notary Public.

Endorsed: 7876. District court. Mary J. Sumner *vs.* David K. Hill. Bond for removal. Filed in district court, Arapahoe Co., Colo., June 22, 1886. William Newell, clerk. Patterson and Thomas.

And afterwards and on, to wit, the 1st day of July, A. D. 1886, came said defendant, by Patterson and Thomas, his attorneys, and filed herein a certain notice.

And said notice is in the words and figures as follows, to wit:

29 *Notice.*

STATE OF COLORADO,
Arapahoe County, } *ss:*

In the District Court.

MARY J. SUMNER
vs.
DAVID K. HILL. } No. 7876.

To L. C. Rockwell, plaintiff's attorney.

DEAR SIR: Please take notice that at 10 o'clock a. m. on Thursday, July 1st, 1886, we will call up for hearing and decision in the above cause the motion and application of defendant to remove said cause for trial to the United States court, when and there you may appear if you see fit so to do.

(Signed) PATTERSON AND THOMAS,
Defendant's Attorneys.

Received copy of above notice June 30th, 1886.

(Signed) L. C. ROCKWELL,
By CARR,
Attorney for Plaintiff.

Endorsed: 7876. District court, Arapahoe county. Mary J. Sumner *vs.* David K. Hill. Notice to call up petition for hearing.
30 Filed in district court, Arapahoe Co., Colo., July 1, 1886. William Newell, clerk. Patterson and Thomas, defendant's attorneys.

And afterwards and on, to wit, the 2nd day of July, A. D. 1886, the same being one of the regular juridical days of the April term, A. D. 1886, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

Order of Removal.

MARY J. SUMNER
vs. } 7876.
DAVID K. HILL.

Money demand.

At this day comes the said defendant, by Lafe Pence, Esq., his attorney, and the said defendant having heretofore presented and filed his petition for the removal of this cause to the circuit court of the United States for the district of Colorado, and having also on the same day filed his bond for such removal, and the court having considered the same—

It is ordered by the court that the said petition and bond be, and they are hereby, approved, and that this action be, and the same hereby is, removed to the said circuit court; and let the clerk of this court make a transcript of the papers in this behalf, to-
31 gether with all orders had and entered of record herein, and certify the same to said circuit court of the United States for the district of Colorado with all convenient speed upon the payment of all costs remaining due in this action.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

I, William Newell, clerk of the district court of Arapahoe county, State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of all pleadings and papers filed and all orders of court had and entered of record in a certain cause lately pending, wherein Mary J. Sumner was plaintiff and David K. Hill was defendant, as the same now remains on file and of record in said court.

Witness my hand and the seal of said court, at the court-house, in Denver, county and State aforesaid, this 17th day of August, A. D. 1886.

[SEAL.] (Signed) WILLIAM NEWELL, *Clerk,*
By G. S. RICHARDS, *Deputy.*

Endorsed: 2002. Circuit court U. S. Mary J. Sumner *vs.* David K. Hill. Transcript of proceedings from district court of Arapahoe county. Filed Aug. 27, 1886. Edward F. Bishop, clerk. Patterson & Thomas, attorneys for defendant.

32 And afterwards and on, to wit, the 4th day of December, A. D. 1886, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Demurrer to Complaint Overruled. Answer in 30 Days.

33 MARY J. SUMNER
vs. } 2002.
DAVID K. HILL.

Money demand. Attachment.

At this day comes the said plaintiff, by L. C. Rockwell, Esq., her attorney, and the said defendant, by C. S. Thomas, Esq., his attorney, also comes.

And the demurrer of the said defendant to the complaint herein having heretofore come on to be heard, and, having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said complaint is sufficient in law, and so the said demurrer is overruled.

And thereupon, on motion of the said defendant, it is ordered by the court that the said defendant answer the complaint herein within thirty (30) days from this day, as he shall be advised.

And afterwards and on, to wit, the 3rd day of January, A. D. 1887, came the defendant, by Messrs. Patterson and Thomas, his attorneys, and filed in said court and in said cause his answer to the complaint heretofore filed herein; and the said answer is in the words and figures as follows, to wit:

34 *Answer.*

UNITED STATES OF AMERICA, } *ss:*
District of Colorado,

In the Circuit Court of the Eighth Judicial Circuit within and for said District.

MARY J. SUMNER, Plaintiff, *vs.* DAVID K. HILL.

The defendant, answering the complaint of the plaintiff, says:

First. He admits the sale and conveyance to him of the undivided one-eighth interest, on the 12th day of February, 1880, in and to the Buckeye Lode mining claim, referred to in the first paragraph of said complaint, for the sum and amount of $10,000, upon which was paid in cash the sum of $1,308.43, and he also admits the execution, upon the day and date aforesaid, by him and the said Edward R. Sumner of a certain instrument in writing, a part of which is set forth in the first paragraph of said complaint, and which said instrument is hereafter set forth in full.

Second. He admits that at the time of said conveyance of said interest in the said mine the owners of the said Buckeye lode were
35 working the same with a view to developing the property,
but he denies that they were mining, extracting, or taking

any ore therefrom; that said work of development was being prosecuted almost at the entire expense of the defendant, the other owners thereof not contributing any part of the expense thereof, and that the said Edward R. Sumner and Edward H. Sumner at no time contributed any part or portion of said expense. He admits that the said claim had been worked, although not continuously, for twelve months previous to the said last-named time; that whether it was the intention of said Edward R. Sumner that said mine should be worked with diligence by this defendant until enough money was derived from this defendant's interest in said property to pay the balance of said purchase-money this defendant has not and cannot obtain any information or knowledge upon which to base a belief, but he denies that it was his intention or purpose to continuously work said mine until enough money was so realized unless from developments carried on the prospect of discovering mineral in paying quantities should continue.

Third. And defendant admits that on or about the 15 day of January, 1881, he ceased working the property aforesaid and shut the same down, and that the same was practically not worked from thence hitherto until some time during the fall of the year 1883, at which time work was resumed and prosecuted until the time and in the manner hereinafter set forth.

Fourth. And defendant admits that about the month of October,
1885, he made a lease of his right and interest in and to the
36 said Buckeye Lode mining claim to one George A. Jenks for
more than one year then following, but he denies that by means thereof he has disposed of one-eighth or any part of said mining claim and property conveyed to him by said Edward R. Sumner or by any other person, and he denies that the balance of said purchase-money is due and owing to the plaintiff or to any one else, less the sum of $3,919.94, or any other sum, or that there was due at that time or at any time the sum or amount of $6,080.06 or any other sum whatsoever.

Fifth. Defendant, further answering, denies that by the terms of said contract the purchase-money thereof was to be paid to said Sumner or his assigns within a reasonable time, or that such reasonable time had expired prior to the 10th day of October, 1883, or that it was intended that he should pay the said plaintiff any sum of money whatsoever unless the same was realized from the sale of ores from said mine or unless he should sell or part with an interest therein to the extent of an undivided one-eighth thereof. He admits that he has failed and refused to pay the said sum of $10,000, except such sums of money as have been chargeable against the said interest of the said Edward H. Sumner in said mine, which was and is more than the sum of $3,919.94, as alleged in said complaint, and which has been paid by this defendant from time to time since his purchase of the said interest of the said Edward R. Sumner. He
further denies that the sum of $6,080.06 or any other sum
37 has been due or owing from said Hill since the said 10th day
of Oct., 1883, or at any other time.

Sixth. Defendant, further answering, admits that on or about the

15th day of January, 1881, he ceased work on said property and shut the said mine down, but denies that he kept it shut down until the month of October, 1885, and that by means of such failure and neglect to work said mine he became liable to pay the plaintiff the sum of money mentioned in the sixth paragraph of said complaint or any other sum whatsoever.

Seventh. That whether on the 12th day of March, 1883, or at any other time the said Edward R. Sumner, for a good and valuable consideration or for any consideration, sold, assigned, transferred, and set over unto plaintiff herein all his right, title, and interest in and to the said contract, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, but he denies that the said contract or any part of it is assignable to the plaintiff or to any other person whomsoever.

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2. And, for a further answer to the said complaint of the plaintiff, this defendant says that for some time prior to the 12th day of February, 1880, he was the owner of an undivided thirty-three one hundred and forty-fourths of the said Buckeye Lode mining claim, the remaining interests in said mine being owned by said Edward R. and Edward H. Sumner and others, the interest of the said Sumners being an undivided one-fourth; that prior to the
said agreement and for a period of nearly twelve months
38 work had been and then was being prosecuted upon said claim
with the object and for the purpose of discovering valuable bodies of ore; that the defendant, being possessed of some means, had been and was advancing most of the funds necessary and essential to the prosecution of said work, and that the interest of said Sumners was in arrears to the said defendant by reason of the advances before then made for such work, and that defendant had little, if any, prospect of being able to collect the same from said Sumners.

Defendant further alleges that he was desirous of prosecuting further work upon said premises, but was not disposed to further bear the burden of such development beyond the proportion of the interest owned in said property; that at the date of said contract, on February 12th, 1880, the defendant had advanced for the payment of such expenses of development the sum of $5,368.27, one-fourth of which — properly chargeable to the said interest of the said Sumners, of which said sum the said Sumners did pay but the sum of $211.25, leaving a balance due upon said one-fourth interest at said time to this defendant of $1,130.82; that upon the said 12th day of February, 1880, and largely by reason of the fact that the said Sumners were without means to pay the expenses consequent upon the further development of said property, the defendant agreed to and did purchase from the said Edward R. Sumner an undivided
one-eighth interest in said property for the agreed sum of
39 $10,000; that defendant was unwilling to pay said sum of
money in cash for said interest in said premises, but to pay the said sum of money as it should be realized from the said property itself; that the said Sumner was anxious not only to make

a sale of said interest, but also to provide against the accumulation of any indebtedness upon or lien against the interest of Edward H. Sumner, his son, in consequence whereof—

The following agreement was entered into by and between this defendant and the said Edward R. Sumner, to wit:

"This is to certify that Edward R. Sumner, of Leadville, State of Colorado, has this day sold to me one undivided one-eighth part of the Buckeye lode, vein, mine, or deposit situate on Fryer Hill, in the California mining district, in the county of Lake, in the State of Colorado, for the sum of ten thousand dollars, to be paid as follows, to wit:

"($1,308.43) one thousand three hundred and eighty & $\frac{43}{100}$ dollars, cash in hand, the receipt of which is hereby acknowledged.

"Second. To pay all expenses for and on behalf of Edward R. Sumner upon one undivided one-eighth part of said mine owned by Edward H. Sumner, which has accrued since the first day of February, A. D. 1880, and which may hereafter accrue for sinking the shaft, upon said mine, for all machinery purchased in sinking the shaft, and in operating the same until pay mineral shall have been reached.

"Third. To pay on behalf of the said Edward R. Sumner for the benefit of Edward H. Sumner, owner of said one-eighth interest of the whole of said mine, one-eighth part of the whole of the expenses for litigation regarding the title and the possession thereof or for trespass which may be committed upon said property from and after the date above written.

"Fourth. And to pay on behalf of the said Edward R. Sumner one-eighth part of all other assessments, taxes, and expenses (meaning upon one-eighth interest owned by Edward H. Sumner, being independent of the one-eighth conveyed to me this day by the said Edward R. Sumner) of every name or nature which may justly accrue against said property, which sum or sums of money, as well as all other sums of money which may be advanced and paid out by me in pursuance of this agreement, shall be applied by endorsement upon this contract by the said Edward R. Sumner or his assigns in payment of the aforesaid sum of ten thousand dollars, as far as the same shall go to the payment thereof.

"Fifth. And, after deducting all the aforesaid sums of money above mentioned, I hereby agree to pay to the said Edward R. Sumner or his order the residue of the said ten thousand dollars out of the first production of my interest in said mine, as soon as the same shall be realized therefrom, and if at any time I shall dispose of or sell a one-eighth part of said mining property, then and in that case the residue of said ten thousand dollars shall become immediately due and payable to the said Edward R. Sumner or his order. In no case am I to pay out more than ten thousand dollars on behalf of said Edward R. Sumner on the one-eighth interest of Edward H. Sumner, including the $1,308.43 mentioned as paid above.

Words and sentences enclosed between rules marked on margin stricken out.

"Witness my hand and seal this twelfth day of February,
41 A. D. 1880, at Chicago, Ills.
"(Signed) DAVID K. HILL. [SEAL.]

"The interlineation between 7th and 8th lines from top was made before signing.
"(Signed) W. T. HOPKINS.
" W. H. HOSKER.

"Recorded March 6th, 1880, at 12 o'clock M.
" JOS. H. WELLS, *Recorder.*
" A. V. INGRAM, *Deputy.*"

And this defendant, further answering, alleges that at the time of said purchase he paid to said Edward R. Sumner the sum of $600 in cash and allowed him as a further credit the amount of money due to this defendant upon the undivided one-eighth interest of said Edward R. Sumner, the sum of $708.43, at which time there was a similar amount due to this defendant from the interest of the said Edward H. Sumner; that work was continued without cessation upon said mine from the 12th day of February, 1880, to about the 16th day of January, 1881, during which time there was expended by this defendant the sum $12,216.81; *on* one-eighth thereof, to wit, the sum of $1,527.10, was properly chargeable against the interest of said Edward H. Sumner.

And this defendant, further answering, alleges that the reason for shutting down work upon the said 16th day of January, 1881, was that the amount of water necessary to be handled in the working 42 of said mine overtax*ing* the lifting power of the pumps provided for that purpose, causing them to break down, in consequence of which said workings were at once flooded; that even with the said large expenditure of money defendant had been wholly unable and had failed to uncover, open, or discover any bodies of ore whatsoever in said mine, and that the indications and the probabilities of such discovery, instead of being increased by the said new developments, were materially lessened, and that the defendant became discouraged and was unwilling to expend any greater amount of money at that time for the purchase of additional machinery; that, as he is informed and believes, when the work upon said premises was, as aforesaid, closed that neither the said Edward R. or Edward H. Sumner made any objection thereto; that the capacity of said pumps was 200 gallons per minute, and that the amount of water coming into said premises had made it necessary to use the said pumps to their utmost capacity for a long period of time prior to said accident.

And the defendant, further answering, alleges that in the prosecution of the work upon said premises it had become necessary to erect extensive buildings for the better protection of the workmen

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Words and sentences enclosed between rules marked on margin stricken out.

and the machinery, and that while said mine remained practically idle from that time until some time in the fall of 1883, it became and was necessary for him to keep a man in charge of said premises, and that one George A. Jenks, before then the manager of this defendant, was engaged to watch, care for, and look after the same to
prevent any injury to the said buildings and machinery,
43 and that the amount due to him for the year 1881, after the
31st day of January, amounts to the sum of $608, one-eighth of which, to wit, $76, was and is properly chargeable against the interest of said Edward H. Sumner.

Defendant, further answering, alleges that the said Jenks, at the request and instance of this defendant and for the purpose of protecting said premises, and without let or hindrance upon the part of the said Edward R. and Edward H. Sumner, did continue during the year 1882 to guard, protect, watch, and care for said premises, and that the reasonable sum expended in the payment of the said Jenks for his services for said period of time was and is the sum of $724.13, one-eighth of which, to wit, $90.45, was and is properly chargeable against the said interest of the said Edward H. Sumner.

Defendant, further answering, alleges that the said mine remained in said condition until some time during the fall of 1882, to wit, about the month of October, at which time work was begun and actively prosecuted up to about the month of November, 1883, during which time, in addition to the amounts of money already mentioned, there was expended by this defendant the sum of $7,021.51, one-eighth of which, to wit, the sum of $877.69, was and is properly chargeable against the said interest of the said Edward H. Sumner under said contract, and that some time during the month of November aforesaid the defendant, not being able to discover any or expose any bodies of ore by means of such work, and
there being little or no prospect of the successful prosecution of
44 said work, again caused the same to be closed and shut down,
and that the said premises remained closed and shut down for some time thereafter.

This defendant, further answering, alleges that during the year 1884, for the purpose of preserving said property and preventing loss or destruction to the machinery and buildings thereon, it became and was necessary to leave the same in charge of a proper custodian, and that defendant employed one George A. Jenks to look after and take care of the same, in consequence of which it became and was necessary to expend the sum of $816.69, which was a proper and reasonable charge in that behalf, one-eighth of which, amounting to the sum of $102.08, was and is a proper charge against the interest of the said Edward H. Sumner pursuant to said contract, and that the same covers not only said services for the year 1884, but also part of the year 1885, extending up to and including the month of September.

And the defendant, further answering, alleges that at the time of the making of said contract, and subsequently thereto, there were pending divers actions at law for the protection of the title to said premises and for the purpose of enabling the owners thereof to obtain a patent to the same; that in and about the proper prosecutions of said actions at law, and in the entry of said mine at the proper land office, the defendant was required to and did expend the sum $1,762.25, one-eighth of which, to wit, $220.28, was and is a proper charge against the said interest of the said Edward H. Sumner in and to said mine.

45 And defendant, further answering, alleges that since this making of the said contract and up to the present time there have been levied for taxes upon said premises and paid by this defendant amounting in the aggregate to $334.01, one-eighth of which, amounting to $41.75, was and is properly chargeable against the interest of the said Edward H. Sumner.

And defendant, further answering, alleges that by reason of the matters and things hereinbefore set forth he has paid and expended in and about the performance of the said contract and by reason of the ownership of the said Edwin H. Sumner of the said one-eighth interest of the said Buckeye mine the sum of $3,673.73, which, added to the amount of $1,308.43, gives a total of $4,982.21 by him paid on account of said contract and being the entire amount due by reason thereof up to the present time and payable.

And defendant, further answering, alleges that by reason of the failure to discover any deposit of valuable ore in said premises and by reason of the further fact that the prospect of discovering such ore by further expenditures was very discouraging, and that because the further prosecution of work would necessitate the further large expenditure of money in and about the obtaining of machinery suitable and proper for the removal of the water and the proper operation of said mine, he became and was disinclined to go to further expense by reason thereof; that ever since the other property owners refused and declined to enter into any other or further 46 expense in and about the prosecution of said work, and that in consequence the said mine was, some time during the month of November, 1883, shut down and the active prosecution of work thereon discontinued; that during the fall of the year 1885 one George A. Jinks,

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who before that time had been the representative of this defendant in Colorado and in charge of said premises, signified his willingness to make further expenditures on his own account on said premises and made a proposition to this defendant and some of the other owners of said mines, provided a lease for that purpose could be executed to him; that, as the result of said proposition, negotiations were entered into which resulted in the making and execution of a certain agreement of lease by all of the owners of said Buckeye mine except him, the said Edward H. Sumner, and which said agreement of lease was and is in words and figures following, to wit:

"This agreement of lease, made this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-five, between

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Words and sentences enclosed between rules marked on margin stricken out.

David K. Hill, of the city of Chicago, county of Cook, and State of Illinois, and Robert Esser, of the city of Leadville, county of Lake, and State of Colorado, lessors, and George A. Jenks, of the city of Leadville, county of Lake, and State of Colorado, lessee, witnesseth:

That the said lessors, for and in consideration of the royalties, covenants, and agreements hereinafter reserved and by said lessee to be paid, kept, and performed, have granted, demised, and let, and by these presents *to* grant, demise, and let unto the said lessee
47 all the following-described mine and mining property, situate *of* California mining district, county of Lake, State of Colorado, to wit: All their interest in the Buckeye Lode mining claim, situate *of* the north slope of Fryer Hill, in said mining district, county, and State, together with the appurtenances; to have and to hold unto the said lessee for the term of two years from date thereof, expiring at noon on the 29th day of July, A. D. 1887, unless sooner forfeited or determined through the violation of any covenant hereinafter against the said tenant reserved.

"And in consideration of such demise the said lessee does covenant and agree with said lessors as follows, to wit:

"To enter upon said mine or premises and work the same mine fashion in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible with due regard to the development and preservation of same as a working mine and to the special covenants hereinafter reserved; to well and sufficiently timber said mine at all points where proper in accordance with good mining, and to repair all old timbering wherever it may become necessary; to keep at all times the drifts, shafts, tunnels, and other workings thoroughly drained and clear of loose rock and rubbish, unless prevented by extraordinary mining casualty; to deliver the said lessors as royalty ten per cent. of the net smelter returns of all ore extracted from said premises running to and including twenty ($20) dollars per ton, and on all ores running over twenty
48 ($20) dollars per ton twenty-five per cent. of the net smelter returns: to deliver to said lessors the said premises, with the appurtenances and all improvements, in good order and condition, with all drifts, shafts, tunnels, and other passages thoroughly clear of loose rock and rubbish and drained and the mine ready for immediate continued working (accidents not arising from negligence alone excluded), without demand or further notice, on said 29th day of July, A. D. 1887, at noon, or at any time previous when demanded for forfeiture.

"And, finally, that upon the violation of any covenant or covnants hereinbefore reserved the term of this lease shall expire and the same and said premises, with appurtenances, shall become forfeited to said lessors, and said lessors or their agent may thereupon, after demand of possession in writing, enter upon said premises and dispossess all persons occupying the same with or without process of law, or, at the option of said lessors, the said tenant and all persons found in occupation may be proceeded against as guilty of unlawful *detained,* and the said lessors expressly reserve to themselves the property and right of property in all minerals to be extracted from said premises during the term of this lease.

"Each and every clause and covenant of this agreement of lease shall extend to the heirs, executors, administrators, and lawful assigns of all parties hereto.

"In witness whereof the said parties hereunto set their names and seals."

And defendant, further answering, alleges that he made said lease for the purpose of securing further development work upon 49 said property without further expense, if possible, either to himself or to the said Edward H. Sumner in the hope that bodies of ore might be uncovered from which the amount of money to become due to said Edward R. Sumner might be realized pursuant to the terms of said contract from the mine itself; that the said lease was made to the person actually in charge of said premises, and by its terms the property in and to the ores to be taken was reserved to the lessors, and the manner and method and working said mine, with the power of re-entry, was reserved to the said lessors, so that they had practical charge and control of the working and operation upon said mine with power to enforce the strict performance of their said contract; that since said time the said lessee has further prosecuted the work of development upon said mine, and, as defendant is informed and believes, has expended large sums of money in the working thereof, one-eighth of which but for the said agreement of lease would have been a charge against the said Edward R. Sumner upon said contract and which by reason of said lease has been wholly saved to him; that during said time this defendant has had reports of the character and condition of its workings to the same extent as reports were made at the time developments were being made by him directly; that he has used all means at his disposal towards the development of said property; has expended many thousand dollars in the desire to make the same valuable and to enable said Edward R. Sumner to so realize his money upon said contract, and has left untried no effort in his power to place said mine upon a paying basis and to disclose 50 any bodies of ore which may exist within its boundaries; that at the time of the purchase of said interest, on the 12th day of February, 1880, it was the desire and intention of the parties that reasonable efforts should be made by this defendant to demonstrate by actual workings the value of said premises; that there was no understanding, either expressed or implied, that he should carry on and conduct said work of development to an unreasonable extent, or that he should be required to expend any particular sum of money or to prosecute said work continuously until the discovery of ores within its boundaries.

Wherefore he says that the terms and conditions of said contract have been complied with by him, and that he is not indebted to said plaintiff or to any other person by reason of said contract.

3. And, for a further defence to said action, the defendant says that, to wit, on the 12th day of February, 1880, he purchased an undivided one-eighth interest in and to the Buckeye claim from Edward

R. Sumner for the agreed sum of ten thousand dollars, pursuant to the terms and conditions named in a certain agreement referred to in the first paragraph of the complaint in this case; that pursuant to the terms thereof he has paid all expenses for and on behalf of the undivided one-eighth interest in said Buckeye lode owned by said Edward H. Sumner since the first day of February, 1880, and from thence hitherto, according to the terms of said contract, not only for the sinking of the shaft upon said property and for machinery purchased therefor, but also for expenses of litigation
51 pertaining to the title of said Buckeye lode for trespasses, taxes, and other expenses properly chargeable against the same.

And defendant further represents that it was provided in and by the said contract that, after crediting the said sums of money upon the said purchase price of $10,000, the balance thereof should be paid out of the first production of defendant's interest in said mine so soon as the same should be realized therefrom, and if he should at any time sell or dispose of one-eighth interest in said property, then the residue of said sum of money should become due and payable to said Edward R. Sumner.

And defendant further says that although he has worked said mine and expended large sums of money, to wit, nearly twenty-five thousand dollars, thereupon, yet he says that there has been no production either upon his interest or upon any interest in said mine; that he has not disposed of or sold one-eighth part or any part of said property to any person or persons by reason of any thing in said contract mentioned.

And, for a further answer and defence in this behalf, defendant says that some time about the — day of October, 1885, he made and entered into an agreement or contract of lease, together with certain of his co-owners of the said Buckeye Lode mining claim, with one George A. Jenks, in which, among other things, it was provided that the said lessee should pay to the said lessors a royalty of ten per cent. upon all ores extracted from said premises of the value of $20 per ton and twenty-five per cent. for all ores extracted of the value of over $20 per ton.

52 That since the making of said agreement the said lessee has taken and caused to be shipped and sold ores running in value from $20 per ton up amounting to $1,767.39 and ores of the value of $20 and under per ton amounting in the aggregate to $14.65, from which said ores there has been paid to this defendant as royalty as aforesaid upon his interest acquired by him on said 12th day of February, 1880, the sum of $157.05, which said sum of money has been tendered to the plaintiff as the amount of the production *if* defendant's interest in said mine since the making of said contract, and which defendant hereby makes good by bringing the same into court and depositing it to the order of the clerk thereon.

Wherefore he prays judgment, &c.

(Signed) PATTERSON & THOMAS,
Att'ys for Def't.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

C. S. Thomas, one of the attorneys for said defendant, being first duly sworn according to law, deposes and says that D. K. Hill, said defendant, is absent from the county and State were affiant resides, wherefore he makes this affidavit, and that he has read the above & foregoing affidavit; that the matters and things therein stated are true according to his best knowledge, information, and belief.

(Signed) C. S. THOMAS.

53 Subscribed and sworn to before me this 3rd day of July, 1887.

[SEAL.] W. W. WALLACE,
Notary Public.

Endorsed: 2002. U. S. circuit court. Mary J. Sumner *vs.* David K. Hill. Answer. Filed Jan. 3, 1887. Edward F. Bishop, clerk. Patterson & Thomas, att'ys for defendant.

And afterwards and on, to wit, the 25th day of January, A. D. 1887, came the said plaintiff, by L. C. Rockwell, Esq., her attorney, and filed in said court and in said cause her motion to strike out parts of the answer heretofore filed herein; and the said motion is in words and figures as follows, to wit:

Motion to Strike Out Parts of Answer.

UNITED STATES OF AMERICA,
District of Colorado, } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

MARY J. SUMNER, Plaintiff, *vs.* DAVID K. HILL, Defendant.

54 Now comes said plaintiff, by L. C. Rockwell, her attorney, and moves the court to strike out and expunge from the record in this cause certain parts and portions of the answer filed herein—that is to say:

1st. To strike out and expunge from said answer the last five lines of the second paragraph of said answer, commencing with the words "that said work of development," found on the 4th line from the bottom of page 1 of said answer, and ending with the words "of said expenses," in the first line of the second page of said answer, because such matter is sham, irrelevant, redundant, immaterial, and insufficient.

2nd. To strike out and expunge all that portion of said answer found on the fourth page thereof, commencing with the words "and for further answer," found in the 18th line from the bottom of the 4th page thereof, and ending with the words "in consequence thereof," found in the 10th line from the bottom of page 5 of said answer, because all such matter is sham, irrelevant, immaterial, redundant, and insufficient.

3rd. To strike out and expunge the last three lines from the bottom of page 7 in said answer and all of page 8 embraced within the first 37 lines of said page and ending with the word "accident," in said last-named line of said answer, and the whole thereof, because said answer is sham, irrelevant, immaterial, redundant, and insufficient.

4th. To strike out and expunge all that part of said answer found and embraced within the last 10 lines from the bottom of the 8th page of said answer, commencing with the words "and that 55 while said mine," found in the 10th line from the bottom of page 8, and ending with the word "Sumner," found in the 10th line from the top of page 9 of said answer, and the whole thereof, because such answer is sham, irrelevant, immaterial, redundant, and insufficient.

5th. To strike out and expunge from said anwser all matter embraced within the last four lines from the bottom of the 9th page of said answer, and also all that found in the first 9 lines of page 10 of said answer down to the word "September," in the 10th line from the top of said 10th page, because said matter is sham, irrelevant, immaterial, redundant, and insufficient.

6th. To strike out and expunge all that part of said answer embraced on page 11 of said answer, commencing with the words "and defendant, further answering," found in the 6th line from the top of said 11th page thereof, and ending with the words "thereon discontinued," found in the 10th line from the bottom of the 11th page thereof, because said matter is irrelevant, immaterial, redundant, sham, and insufficient.

(Signed) L. C. ROCKWELL,
Att'y for Pl'ff.

Received a copy of the above this 22nd day of January, 1887.
(Signed) PATTERSON & THOMAS,
Att'ys for Def't.

56 Endorsed: No. 2002. In the circuit court of the United States. Mary J. Sumner, plaintiff, *vs.* David K. Hill, defendant. Motion to strike out parts of answer. Filed Jan. 25, 1887. Edward F. Bishop, clerk. L. C. Rockwell, att'y for pl'ff.

And afterwards and on, to wit, the 17th day of May, A. D. 1887, the same being one of the regular juridical days of the May term, A. D. 1887, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Motion to Strike Out Portions of Answer Sustained. Motion for Judgment Denied.

MARY J. SUMNER
vs. } 2002.
DAVID K. HILL.

Money demand. Attachment.

At this day comes the said plaintiff, by L. C. Rockwell, Esq., her attorney, and the said defendant, by C. S. Thomas, Esq., his attorney, also comes.

57 And the motion of the said plaintiff to strike from the files herein portions of the answer, and the motion of the said plaintiff for judgment having heretofore come on to be heard, and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court that the motion to strike out parts of the answer herein be sustained as to all of said motion, save the fourth and fifth clauses thereof.

It is further ordered by the court that the said motion for judgment be denied.

And afterwards and on, to wit, the 18th day of October, A. D. 1887, came again the said plaintiff, by her attorney aforesaid, and filed in said court and in said cause her replication to the answer heretofore filed herein; and the said replication is in words and figures as follows, to wit:

Replication.

UNITED STATES OF AMERICA,
District of Colorado, } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

58 MARY J. SUMNER, Plaintiff,
vs. } No. 2002.
DAVID K. HILL, Defendant.

The plaintiff, replying to that portion of the answer of the defendant found on page 7, on information and belief, denies that said defendant Hill paid to Edward R. Sumner on the 12th day of February, 1880, or at any other time the sum of $2,016.86 or any other sum whatsoever over and above the sum of $1,308.43; denies that on the day and date last aforesaid or at any other time there was due from Edward H. Sumner to the defendant Hill on the interest then held and owned by said Edward H. Sumner the sum of $708.43 or any other sum of money whatsoever, save and except the sum of money next hereinafter stated, and, on information and belief, de-

nies that from the 12th day of February, 1880, until the 16th day of January, 1881, there was expended upon said Buckeye lode by said Hill the sum of $12,216.80 or any other sum whatsoever, except the sum of money next hereinafter stated; denies that one-eighth of said sum, to wit, $1,527.10 or any other sum was properly chargeable against the interest of said Edward H. Sumner in said Buckeye lode, save and except the following amounts: That the following credits have been endorsed upon said contract, for which said defendant is entitled to credit and all the credit which said defendant is
59 entitled to on the same: April 1st, 1880, for assessments due on the interest of Edward H. Sumner, $421.19, for the months of February and March of that year; May 22nd, 1880, $464.51, assessments upon one-eighth interest of said Edward H. Sumner for the months of April and May of that year; Oct. 1st, 1880, $484.08, assessments for the months of July, August, and September of that year; November 30th, 1880, $127.97, assessments on the one-eighth interest of said Edward H. Sumner for Oct. and November of that year.

On October 10th, 1883, $1,113.76 assessments from November 30th, 1880, to October 10th, 1883, on the one-eighth interest of the said E. H. Sumner in said Buckeye lode; that on the days and dates last above given when said respective sums were credited upon said contract plaintiff and defendant had a full and fair settlement of and concerning all moneys before then expended upon said Buckeye lode by said defendant, and the one-eighth thereof was then and there charged up by said defendant against said Edward H. Sumner's interest in said Buckeye lode and that amount then and there endorsed upon said contract as a payment thereon, which sums of money, respectively, plaintiff then and there accepted as being all the money defendant was entitled to have applied and credited upon said contract.

Plaintiff, further replying to said answer and the matters and things set forth on the last half of page 8 thereof, denies it was necessary, lawful, or proper for said Hill to erect expensive or
60 any buildings on said Buckeye lode for the protection of the workmen and machinery thereon; denies it was necessary, right, or proper for said defendant to keep a man in charge of said premises from the year 1881 to the year 1883, or during any part or portion of that time, and charge one-eighth of said expense to the interest of said Edward H. Sumner in said lode, and denies that said defendant paid to one George A. Jenks for watching and caring for said premises from the year 1881 to the year 1883 the sum of $608 or any other sum, and denies that the one-eighth portion thereof, or $76, was or is properly chargeable against the interest of said Edward H. Sumner.

Plaintiff, further replying, alleges that even though said money was so paid out to said George A. Jenks that the money so paid out, laid out, and expended for watching said premises from the year 1881 to the year 1883 was included and embraced in the settlement had between said plaintiff and defendant upon the 10th day of October, 1883, at which time said plaintiff allowed a credit upon said contract as assessments against the interest of said Edward H. Sumner the sum of $1,113.76, which was all the money at that time chargeable against the interest of said Edward H. Sumner in said Buckeye lode for and on account of assessments and upon all other accounts of every name and nature whatsoever.

This plaintiff, further replying to the answer of said defendant found upon the 9th page thereof, denies that during the year 1882
61 or at any other time said defendant paid said George A. Jenks for guarding, protecting, watching, and caring for said property and premises the sum of $724.13 or any other sum whatsoever, and denies that one-eighth part of said last-named sum, or $90.45, was or is properly chargeable against the one-eighth interest which said Edward H. Sumner had and held in said Buckeye lode; denies that from the month of October, 1882, until the month of November, 1883, the said defendant expended upon said property the sum of $7,021.51 in addition to the other sums mentioned in said answer or otherwise or any sum of money whatsoever; denies that $877.69 or one-eighth thereof was or is properly chargeable against the interest of said Edward H. Sumner under said contract, but this plaintiff avers that upon the 10th day of October, 1883, said plaintiff and defendant had a full, fair, complete, and final settlement of and concerning all moneys which defendant had theretofore advanced, paid out, laid out, and expended in working said property, and all moneys for litigation regarding the title and the possession thereof and for trespasses which were committed upon said property prior to that date and of and concerning all moneys which said defendant had properly paid out, laid out, and expended under the terms, clauses, and conditions of said contract, which amounted to $8,910.08, one-eighth of which, or $1,113.76, was then and there allowed by plaintiff and defendant upon said contract as a credit thereon, that being the amount which the interest represented by Edward H.
62 Sumner owed to said defendant for money so before then paid out, laid out, and expended, which sum of $1,113.76 was then and there, to wit, upon the 10th day of October, A. D. 1883, endorsed upon said contract as a payment thereon, which released said one-eighth interest then owned by said Edward H. Sumner from all further assessments, taxes, and expenses of every name and nature whatsoever.

This plaintiff, further replying, denies that on and after the 10th day of October, 1883, during the years 1884 and 1885, or for any other period of time after the said 10th day of October, 1883, said defendant necessarily paid out, laid out, and expended in watching said property and taking care of the same to said George A. Jenks or to any one else the sum of $816.69 or any other sum whatsoever; denies that one-eighth thereof, or $102.08, is or was properly chargeable against the interest of said Edward H. Sumner pursuant to said contract, and denies that the last-named sum should be credited upon the contract sued on in this cause, because plaintiff alleges that under and pursuant to the terms, clauses, and conditions of said contract said defendant covenanted and agreed that he would work said property continuously and with reasonable diligence, and

plaintiff avers that during all the time last aforesaid, to wit, on and
after the 10th day of October, 1883, and all of 1884 and 1885, said
property remained idle and was unworked by said defendant, and
that no credit should be allowed upon said contract for the in-
terest which said Edward H. Sumner had in said property
63 for and during the time said property remained idle and
unworked.

And this plaintiff, further replying to said answer and that portion thereof found on the 10th page thereof, says it is not true and she denies that said defendant expended in the prosecution of actions at law and in the entry of said land at the proper land office the sum of $1,762.25 or any other sum of money, and denies that one-eighth thereof, or $220.28, was or is properly chargeable against the said interest of said Edward H. Sumner, and denies that he is entitled to a credit upon said contract for the last-named sum or any other sum of money whatsoever, because plaintiff alleges that said $1,762.25 and the whole thereof so as aforesaid claimed to have been paid out, laid out, and expended by said defendant upon said property in the prosecution of actions at law and in the entry of said property in the proper land office was included in the settlement had between plaintiff and defendant upon the 10th day of October, 1883, and no part or portion thereof was expended and laid out on and after that date.

Plaintiff, further replying, says that — the sum of $334.01 claimed
to have been paid, laid out, and expended for taxes that the greater
part thereof was paid, laid out, and expended prior to the 10th day
of October, 1883, and not over $50 of said $334.01 was paid, laid
out, and expended for taxes by said defendant on and after said 10th
day of October, 1883; and plaintiff admits that one-eighth
64 of $50, or $6.50, and no more, is a proper credit to be allowed
defendant upon said contract as one-eighth of the money paid
for taxes by said defendant since the settlement of October 10th,
1883, and plaintiff denies that the sum of $41.75 for taxes or any
other sum over and above $6.25 for said taxes was or is properly
chargeable against the interest of said Edward H. Sumner upon
said contract.

This plaintiff, further replying, denies that *plaintiff* has paid out, laid out, and expended the sum of $4,982.21 or any other sum of money upon said one-eighth interest in said Buckeye lode standing in the name of said Edward H. Sumner save and except the respective sums of money hereinbefore stated and set forth, which amounts to only $2,617.76 and no more.

Wherefore plaintiff demands judgment as in and by her said complaint she has already prayed.

(Signed) L. C. ROCKWELL,
Att'y for Pl'ff.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

Mary J. Sumner, of lawful age, being first duly sworn according to law, on oath deposes and says she is the plaintiff in this action;

that she has read the foregoing replication and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters and things therein stated on information and belief, and as to those she believes it to be true.

(Signed) MARY J. SUMNER.

65 Subscribed and sworn to before me this 17th day of October, A. D. 1887.

[SEAL.] (Signed) HARRY CARR,
Notary Public in and for Arapahoe County, Colorado.

My commission expires July 26th, 1888.

DENVER, COLORADO, *October 18th*, 1887.

Received a copy of the foregoing replication this day.

(Signed) PATTERSON & THOMAS,
Atty's for Def't.

Endorsed: No. 2002. Circuit court of the United States. Mary J. Sumner, plaintiff, *vs.* David K. Hill, defendant. Replication. Filed Oct. 18, 1887. William A. Willard, clerk. L. C. Rockwell, att'y for pl'ff.

And afterwards and on, to wit, the 16th day of January, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

66 *Order. Trial Commenced.*

MARY J. SUMNER
vs. } 2002.
DAVID K. HILL.

Money demand. Attachment.

At this day comes the said plaintiff, by L. C. Rockwell, Esq., her attorney, and the said defendant, by C. S. Thomas, Esq., his attorney, also comes.

And thereupon comes a jury, to wit, Isaac Baer, Jacob S. Dunbar, H. R. Green, Charles A. Eldridge, Thaddeus Benight, Cy. Allen, George Mitchell, William Law, Andrew K. Clark, F. H. Lamar, Louis Cohn, Frank N. Smith, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn, to well and truly try the issues herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

67 And afterwards and on, to wit, the 17th day of January, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued.

MARY J. SUMNER }
vs. } 2002.
DAVID K. HILL. }

Money demand. Attachment.

At this day come again the said parties, by their attorneys, respectively, and the jurors heretofore impaneled and sworn in this cause being now all here present and in the jury box, the hearing of the evidence herein is resumed; and the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And thereupon it is ordered that should the said jurors agree upon a verdict during the adjournment of the court they may reduce it to writing, seal it, and deliver it to their foreman, to be by him delivered to the court at its next incoming, and thereupon may retire to meet the court at its next incoming.

68 And afterwards and on, to wit, the 18th day of January, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial. Verdict for Plaintiff.

MARY J. SUMNER }
vs. } 2002.
DAVID K. HILL. }

Money demand. Attachment.

At this day come again the said parties, by their attorneys, respectively, and the said jurors, being now all here present and in the jury box, upon their oaths do say they find for the plaintiff and assess the amount due the plaintiff at seven thousand three hundred and ninety dollars ($7,390.00).

And afterwards and on, to wit, the 31st day of January, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

69 *Order. Motion for New Trial Overruled. Judgment for Plaintiff.*

MARY J. SUMNER }
vs. } 2002.
DAVID K. HILL. }

Money demand. Attachment.

At this day comes the said plaintiff, by L. C. Rockwell, Esq., her attorney, and the said defendant, by C. S. Thomas, Esq., his attorney, also comes.

And the motion of the said defendant for a new trial of the issues herein joined, coming on now to be heard, is submitted to the court, and the court being now sufficiently advised in the premises, and the said plaintiff now here in open court remitting unto the said defendant three hundred dollars and eighteen cents ($300.18), parcel of the amount named in the verdict of the jury herein, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore, on motion of the said plaintiff, it is considered by the court that judgment be entered herein upon the verdict of the jury in favor of the said plaintiff and against the said defendant for the sum of seven thousand and ninety dollars ($7,090), remainder of the damages herein, in form aforesaid assessed, and the said plaintiff's costs to be taxed.

70 And day until sixty (60) days from this day is allowed the said defendant to file herein his bill of exceptions reserved by him upon the trial of the issues herein joined, and let supersedeas bond upon writ of error herein be in the sum of ten thousand dollars ($10,000.00).

And thereupon and on the same day, to wit, the 31st day of January, A. D. 1888, judgment was duly entered in the judgment book of said court and in said cause in pursuance of the statutes and rules of court, to wit:

Judgment.

MARY J. SUMNER }
vs. } 2002.
DAVID K. HILL. }

Money demand. Attachment.

On this 31st day of January, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court, there being present the Honorable Moses Hallett, district judge, it is considered by the court that the said plaintiff do have and recover of and from the said defendant seven thousand and ninety dollars ($7,090.00), her damages by occasion of the premises in her complaint mentioned, in form aforesaid assessed, and her costs in this behalf laid out and expended, to be taxed, and have execution therefor.

71 And afterwards and on, to wit, the 20th day of March, A. D. 1888, came again the said defendant, by his attorneys aforesaid, and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of this cause; and the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the Eighth Judicial Circuit in and for the said District of Colorado. November Term, A. D. 1887.

MARY J. SUMNER, Plaintiff, }
vs. } No. 2002.
DAVID K. HILL, Defendant. }

Be it remembered that on the 16th day of January, 1888, the same being one of the days of the regular November term, 1887, of said court, this cause came on for hearing; whereupon, to maintain the issues on her part, the plaintiff gave in evidence the contract declared upon and admitted by the answer, together with the endorsements of payments thereon, which is in words and figures following, to wit: 72

This is to certify that Edward R. Sumner, of Leadville, State of Colorado, has this day sold to me one undivided one-eighth part of the Buckeye lode, vein, mine, or deposit, situated on Fryer Hill, in the California mining district, in the county of Lake, in the State of Colorado, for the sum of ten thousand dollars, to be paid as follows, to wit, ($1,308.43) one thousand three hundred eight $\frac{43}{100}$ dollars cash in hand, the receipt of which is hereby acknowledged.

Second. To pay all expenses for and on behalf of Edward R. Sumner upon one undivided one-eighth part of said mine owned by Edward H. Sumner which *has* accrued since the first day of February, A. D. 1880, and which may hereafter accrue for sinking the shaft upon said mine, for all machinery purchased in sinking the shaft and in operating the same until pay mineral shall have been reached.

Third. To pay on behalf of said Edward R. Sumner, for the benefit of Edward H. Sumner, owner of said one-eighth interest of the whole of said mine, one-eighth part of all the expenses for litigation regarding the title and the possession thereof or for trespasses which may be committed upon said property from and after the date above written.

Fourth. And to pay on behalf of the said Edward R. Sumner one-eighth part of all other assessments, taxes, and expenses (meaning upon the one-eighth interest owned by Edward H. Sumner, being independent of the one-eighth conveyed to 73 me this day by said Edward R. Sumner) of every name and nature which may justly accrue against said property, which sum or sums of money, as well as all other sums of money which may be advanced and paid out by me in pursuance of this agreement, shall be applied by endorsement upon this contract by the said Edward R. Sumner or his assigns in payment of the aforesaid sum of ten thousand dollars, as far as the same shall go to the payment thereof.

Fifth. And after deducting all the aforesaid sums of money above mentioned I hereby agree to pay to the said Edward R. Sumner or his order the residue of the said ten thousand dollars out of the first production of my interest in said mine so soon as the same shall be realized therefrom; and if at any time I shall dispose of or sell one-eighth part of said mining property, then and in that case the residue of said ten thousand dollars shall become immediately due and payable to the said Edward R. Sumner or his order. In no case am I to pay out more than ten thousand dollars on behalf of said Edward R. Sumner on the one-eighth interest of Edward H. Sumner, including the $1,308.43 mentioned as paid above.

Witness my hand and seal this twelfth day of February, A. D. 1880, at Chicago, Illinois.

(Signed) DAVID K. HILL. [SEAL.]

The interlin-ation between the 7th and 8th lines from top was made before signing.

W. T. HOPKINS.
W. J. HARPER.

74 For value received I hereby assign and transfer to Mary J. Sumner all my right, title, and interest in and to the within contract, according to the terms herewith set forth, this March 12th, 1883.

EDWARD R. SUMNER. [S'L.]

Endorsements on back of contract.

$421.19. "LEADVILLE, *April 1st*, 1880.

Received on assessments for February and March in full on ($\frac{1}{8}$) one-eighth interest of E. H. Sumner, as p'r within contract.

E. R. SUMNER."

$464.51. "CHICAGO, *May 22nd*, '80.

Received on assessments for April and May in full on ($\frac{1}{8}$) one-eighth interest of E. H. Sumner, as per within contract.

E. R. SUMNER."

$484.08. "LEADVILLE, *October 1st*, 1880.

Received on assessments for July, August, & September in full — ($\frac{1}{8}$) one-eighth interest of E. H. Sumner, as p'r wihin contract.

E. R. SUMNER."

$127.97. "LEADVILLE, *Nov.* 30th, 1880.

Received on assessments on the within — for October and November in full on ($\frac{1}{8}$) one-eighth interest in Buckeye mine of E. H. Sumner one hundred and twenty-seven $\frac{97}{100}$ dollars in full.

E. R. SUMNER."

$1,113.76. LEADVILLE, *Oct.* 10*th*, 1883.

Received on assessments from November 30th, 1880, to October 10th, 1883, in full on one-eighth interest of E. H. Sumner, as p'r within contract.

75 "18008. *Agreement.*

From David K. Hill to Edward R. Sumner and Edward H. Sumner.

STATE OF COLORADO, *County of Lake:*

Entered for record at 12 o'clock m. Mar. 6th, 1880, and duly recorded in Record Book 28, page 287.

JOS. H. WELLS.
E. T. WOLVETER, *Deputy.*"

(True copy of agreement.)

Edward R. Sumner was thereupon sworn to show that the endorsements on said contract were made by one George A. Jenks, the agent of the defendant, at the times and under the circumstances therein stated and for moneys expended on the mine chargeable to his account under said contract; that he was present when all of said endorsements were made; that Edward H. Sumner, whose interest is therein specified was the son of the witness; that the said Jenks was and during all of these times had been the agent of the defendant, and that prior to the making of said contract the witness and the defendant had worked the Buckeye mine together; that defendant after the contract was made did not work the mine over three months; that it was shut down in January previous to the making of the contract and work did not commence on the mines after the contract was drawn until some time in November; that the mine was shut down again about the 22nd day of February, 1881, and remained idle until about December 2nd, 1882, when it was started
76 up again by defendant — run until some time in December,
1883; that of the three years it was idle nearly two and run about eleven months, since which time it has not been worked.

That defendant leased the mine about July 29th, 1884; that witness assigned the contract to the plaintiff.

On cross-examination the witness gave evidence tending to show that the assignment was made about the date of it—March 12th, 1883.

And thereupon defendant's counsel asked the witness this question: "What was the consideration of that assignment?"

To the asking and answering of which question plaintiff, by her counsel, then and there objected, because wholly immaterial and because counsel for plaintiff need not have proven such assignment, and because defendant is not interested therein, and the court sustained the said objection; to which ruling of the court defendant, by his counsel, then and there excepted.

The witness then gave evidence tending to show that the endorsements on the back of the contract were made on the dates mentioned and that he was present when they were made, with one exception—this was the April endorsement; that the endorsements included everything up to their respective dates that Captain Jenks had on his books at the time of the endorsement.

That Harper and Hopkins, of Chicago, drew the contract signed by Mr. Hill; that $500 of the amount expressed as paid in the contract was cash and the balance went on machinery; that the 77 difference between the $1,308 and the amount received in cash was the amount due on witness' interest in the mine for work, which Hill had already advanced; that the working of the mine was shut down about February, 1881, because, as Captain Jenks wrote me, the water was too strong for the machinery and the pumps were not sufficient to keep the water out.

That the mine ran on from the date of the contract until some time about the middle of May; that about the 14th of May Jenks went to Chicago and shut the mine down at that time, and did not run any more until November, 1880, when new pumps were put in, after which the work ran on until about February 22nd, 1881, when it was shut down, as Captain Jenks wrote me, on account of the machinery being inadequate to handle the water.

I wrote Capt. Jenks to know why the mine shut down, and he wrote me that Hill ordered him to shut it down. That is all I know about it.

That work began again December 2nd, 1882, and continued until December, 1883, when the mine was again shut down, but why the witness did not know; that they made calculation on considerable, but got very little money from the ore which was struck; does not know whether any profit was made upon the mine; could not say who paid the taxes since 1883; plaintiff did not pay them, to witness' knowledge; understood that Jenks would pay them with money that he took from the mine and money received from the Chrysolite company for the privilege of running a track across the property.

That after the mine was shut down in December, 1883, witness wrote to defendant about it to know what he was going to 78 do, and that defendant replied that he would write to Captain Jenks and let him know. He merely mentioned he had spent a good deal of money and he didn't propose to spend any more.

Thereupon the plaintiff offered in evidence the lease set forth in said complaint, a copy of which is as follows:

This agreement of lease, made this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-five, between David K. Hill, of the city of Chicago, county of Cook, and State of Illinois, and Robert Esser, of the city of Leadville, county of Lake, and State of Colorado, lessors, and George A. Jenks, of the city of Leadville, county of Lake, and State of Colorado, lessee, witnesseth:

That the said lessors, for and in consideration of the royalties, covenants, and agreements hereinafter reserved and by the said lessee to be paid, kept, and performed, have granted, demised, and let, and by these presents do grant, demise, and let, unto the said lessee all the following-described mine and mining property, situate in California mining district, county of Lake, and State of Colorado, to wit:

All their interest in the "Buckeye" Lode mining claim situate on the north slope of Fryer Hill, in said mining district, county, and State, together with the appurtenances:

To have and to hold unto the said lessee for the term of two years from date hereof, expiring at noon on the 29th day of July, A. D. 1887, unless sooner forfeited or determined through the violation of any covenant hereinafter against the said tenant reserved.

And in consideration of such demise the said lessee does
79 covenant and agree with said lessors as follows, to wit:

To enter upon said mine or premises and work the same mine fashion, in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible, with due regard to the development and preservation of the same as a workable mine and to the special covenants hereinafter reserved.

To well and sufficiently timber said mine at all points where proper in accordance with good mining, and to repair all old timbering wherever it may become necessary.

To keep at all times the drifts, shafts, tunnels, and other workings thoroughly drained and clear of loose rock and rubbish, unless prevented by extraordinary mining casualty.

To deliver to said lessors as royalty ten per cent. of the net smelter returns of all ore extracted from said premises running to and including twenty dollars ($20) per ton, and on all ores running over twenty dollars ($20) per ton twenty-five per cent. of the net smelter returns.

To deliver to said lessors the said premises, with the appurtenances and all improvements, in good order and condition, with all drifts, shafts, tunnels, and other passages thoroughly clear of loose rock and rubbish and drained, and the mine ready for immediate continued work (accidents not arising from negligence alone ex-
80 cluded), without demand or further notice, on said 29th day
of July, A. D. 1887, at noon or at any time previous, upon demand for forfeiture.

And, finally, that upon the violation of any covenant or covenants hereinbefore reserved the term of this lease shall, at the option of the lessors, expire, and the same, with said premises, with the appurtenances, shall become forfeited to said lessors, and said lessors or their agent may thereupon, after demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without process of law, or, at the option of said lessors, the said tenant and all persons found in occupation may be proceeded against as guilty of unlawful detainer.

And the said lessors expressly reserve to themselves the property and right of property in all minerals to be extracted from said premises during the term of this lease.

Each and every clause and covenant of this agreement of lease shall extend to the heirs, executors, administrators, and lawful assigns of all parties hereto.

In witness whereof the said parties have hereunto set their hands and seals.

ROBERT ESSES. [SEAL.]
DAVID K. HILL. [SEAL.]
GEORGE A. JENKS. [SEAL.]

Whereupon the plaintiff rested.

81 And thereupon the defendant, by his counsel, read in evidence to the jury the deposition of David K. Hill, which tended to show that he had known Edward R. Sumner since 1880; that he entered into a contract, but does not remember the date; that the reason for entering into the contract was that Sumner was in debt and could not pay the assessments, and, as witness was furnishing the money, he thought he might as well purchase an interest at most any price, and if it was a success he could pay him, and if it was not he would lose the money anyway. Prior to making the contract Edward R. or Edward H. Sumner had advanced on their interest and proportion of the work something like $1,300. At the time the contract was made there was nothing said about continuously working the mine. That he had known George A. Jenks since the fall of 1872. Jenks was in possession and representing witness from the time of about the purchase, and was looking after it when it was not being worked. That the reason work was discontinued was because he had expended a large amount of money and had found no ore. Some time after ceasing work received a letter from Edward R. Sumner, but cannot give the purport of it. That he had made no contract with Jenks to take care or look after the Buckeye mine, and *have* paid him nothing. Presumes the taxes have been paid and charged to him. Has no recollection of receiving notice of the assignment from Edward R. Sumner to plaintiff.

82 To his knowledge there *was* no bodies of ore discovered in the mine. That at the time of making the contract of February 12th, 1880, there was due on the Sumner interest about $1,300.

That his object in making the lease of October, 1885, to Jenks and others was to better the interests of all concerned. No one objected to his making the lease; presumes that charges were made against the Sumner interest during the time the property was being worked under the lease.

That Jenks made regular reports of moneys expended; since February 12th, 1880, has paid for work, development, &c., including legal expenses, upon the mine about $20,000 in round numbers; after finding record says he will say that he paid $600 in cash at the time of making the contract, and that the record shows that he has paid out $27,212, which is derived from reports furnished by Mr. Jenks.

On cross-examination the witness gave evidence tending to show that he never gave any instructions as to work on the mine, but authorized Mr. Jenks to use his own judgment; that he sent the money with which to pay off the pay-roll by draft; that Jenks purchased all machinery with consent of witness; thinks that Jenks reported to him that he had received $62.00 from the sale of ore; that he personally paid no bills; that Jenks made reports showing the amount of money expended; that he was not aware of Jenks and his son living at the mine; does not recollect of paying Jenks and his son anything for watching the mine; that Jenks never rendered any account for watching the mine; that he made a lease of his interest, but not of the whole mine, to Jenks, directing that all
83 moneys which would naturally belong to Sumner's interest
should be credited in full to him; that he has not sold or made a contract to sell his interest in the Buckeye mine to Jenks; that Mr. Jenks expended the moneys for legal services and has the vouchers; that he has never seen the endorsements made on the contract by Jenks; that Jenks was authorized to make the endorsements.

And thereupon George A. Jenks, a witness for defendant, gave evidence tending to show that he had lived at Leadville nine years, during which time he had been engaged in mining, chiefly as agent of defendant, who resided in Chicago, Illinois; that he had full charge of everything connected with the mining property of defendant, hiring men, disbursing money, &c.; that the endorsements upon the contract testified to by witness Sumner were correct, but that after the 10th day of October, 1883, and between that date and the making of the lease of July 29th, 1885, certain other disbursements had been made; that the mine continued to run from the 10th day of October, 1883, up to the first day of December of that year; that the regular settlement day was the 10th of each month; that on the 11th of November, 1883, $714.93 was paid for wages, lumber, coal, various timbers, underground survey, hardware bill, and general expenses of that kind by the witness out of the money of the defendant, and in December following, for the same purposes, witness paid with moneys furnished by the defendant $730.49; that the mine was shut down in December, 1883, because little or no mineral had been found and defendant felt discouraged at the outlay and the strike of
84 mineral amounted to nothing, so that he was discouraged;
that the mine was shut down in 1881 because the water could not be handled with the pumps on the property when running to their full capacity, which was 200 gallons per minute; that in April, 1884, $199.83 was paid for a watchman for the property; that on May 23d $195.01 was paid for taxes of 1880, 1881, 1882, and 1883, with $1.00 additional for exchange, the tax receipts for which were produced; that on June first, 1884, witness paid himself $25 for services under a settlement had with the defendant, which was a balance for services outside of as watchman on the property; that on July 31st, 1884, there was paid for watchman $277.50, including 20 days in

July and the months of April, May, and June, the whole amount for that month for other expenses being $285.40, the differences being for oil and coal; that in September there was paid for oil, coal, and services of watchman from July 20th to the last of September $100.00; October 10th, 1884, coal, $10.45, all of said moneys being received from the defendant Hill save some money from the Crysolite lease; that in 1884 there was received $64.51 from the sale of ore. The first payment from the Crysolite Company was September 30th, 1884, $100.00, which was used in part payment for the total expenditure for 1884. In 1885 he paid for services attending land office concerning patent on property $5.40; taxes for 1884, $86.26; to witness for watching mine from October, 1884, to July 31st, 1885,
$608.00; taxes for 1885, $31.50; taxes for 1886, $30.50, the
85 receipts for said taxes then being produced; that witness
was lessee of the property.

Q. Will you state how much money was expended in the development of the property during the continuance of that lease?

To the asking of which question the plaintiff objects because immaterial, and the court sustained the objection; to the sustaining of which the defendant, by his counsel, then and there excepted.

Q. In the development and working of that lease were you able to find any mineral; and, if so, how much?

To the asking of which question plaintiff, by her counsel, then and there objected, and which objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there excepted.

Witness then gave evidence tending to show that he was in possession of the premises for defendant, and had been in possession for him since July, 1879; that he was in Chicago in 1884 and had an understanding with defendant that he should take care of his interests in the mine, and agreed that he would do it as cheaply as possible.

At that time the watchman on the mine was being paid $2.50, and he charged thereafter but $2.00 per day for that service, the bills for which were rendered to the defendant; that since July, 1884, he had been on the mine himself part of the time and another person part of the time.

That the buildings on the premises are of wood, and that
86 if they had not been guarded they would have been carried
away in less than 60 days and stolen; that that had been the experience of others in that locality.

On cross-examination the witness gave evidence tending to show that in getting the money to discharge the pay-roll during the early part of his business he went to the bank and drew on the defendant for whatever amount was required to pay the indebtedness, sending his statement afterwards. During the latter part of his business with defendant he wrote to him giving the amount for which the draft was sent; that he sent the vouchers to the defendant for vari-

ous expenses every month the mine was running; always took receipts for bills when paid, which receipts are in witness' possession, and never sent them to Hill; that — all statements sent to the defendant with items defendant was informed that he was being charged for a watchman right along; that since in July, 1884, defendant directed witness to discharge the watchman and informed and instructed him to take care of the property himself and protect it, which the witness did; that one building on the property is 25 by 75 feet, built in the fall of 1882, in which an engine and boiler, gallows frame, and all machinery required outside of pumping machinery; that after the building was built witness had a room partitioned off for living purposes, in which, since that time, he and his son have lived only for the purpose of guarding the property, having a better place in Leadville; that witness' son had been with him since 1880, except one year, and both remained on the
87 premises. In his understanding they were charging $2.00 per day for guarding it; that for the past year or two his business had been to attend to his mining interests; that he was not foreman of the Duncan except in 1883 for seven or eight months; that the first charge for watching is $199.83, being for that purpose and coal and hardware also; that the next item is $277.50; the next $608; that they paid $2.50 per day for that service for another property owned by defendant at the same time; that he cannot see how the defendant says the mine was never watched unless he has forgotten it; that when the mine is running that it is not necessary to have a watchman except it would be necessary to watch it at night to prevent tools being stolen; that no charge was made for watching it any time while it was running, the money for watching being charged up while the mine was idle, and that coal and oil is for warmth and light for the room; that the amount first testified to for running the mine in November and December, 1883, being $1,445.45, accrued during those months for working the mine, since which time it has not been run.

Defendant, by his counsel, thereupon calls the attention to the allegation of defendant's answer setting up the product under the lease of $157.05, which had been tendered and deposited with the register of the court, whose receipt therefor is filed in evidence, dated January 25th, 1887; that since that time and on the 15th day of February defendant has tendered $80.08, which the plaintiff declined to receive, making in all $237.13.

Which was all the evidence offered in said cause, and thereupon the court charged the jury as follows:

88 This contract, gentlemen, was a purchase by the defendant from the plaintiff of one-eighth interest in the Buckeye lode for the sum of $10,000. The contract provides that certain expenses which had been incurred in respect to the interest of another person named Sumner, the son, I believe, of the grantor in this contract, and expenses which should be incurred in working the mine in behalf of that interest, should be paid out of the ten thousand dollars, and certain taxes, and, perhaps, other matters.

The contract appears to have been very carefully drawn to provide for the satisfaction of all demands against the interest of Edward H. Sumner out of this ten thousand dollars; and then it was provided that after deducting all the aforesaid sums of money above mentioned "I hereby agree to pay to said Edward R. Sumner or his order the residue of the said $10,000 out of the first production of my interest in said mine as soon as the same shall be realized therefrom."

Now, with respect to that matter, if that were all there was in the agreement the defendent would only be bound to some reasonable effort to find this sum of money in the mine, and it would be a question whether he had prosecuted work sufficiently to show whether the money could be taken from the mine or not. But there is another provision in the contract which must be regarded as showing that it was the intention of the parties that the work
should be prosecuted until the sum of ten thousand dollars
89 should be exhausted in behalf of the interest of Edward H.
Sumner, or the ore should be found which would be sufficient
to pay the amount which might then be due of the $10,000 after deducting the part which was to be applied to the interest of Edward H. Sumner.

The last clause of the agreement is: "In no case am I to pay out more than ten thousand dollars on behalf of said Edward R. Sumner on the one-eighth interest of said Edward H. Sumner, including the $1,308.43 mentioned above." As to the work necessary to be done to satisfy the terms of the contract with a view to take out this money, this $10,000, or so much thereof as should not be applicable to the interest of Edward H. Sumner, the contract must be regarded as requiring the defendant to proceed with reasonable diligence in the prosecution of the work until he should have taken out this money or should have expended for the interest of Edward H. Sumner the $10,000. Of course, whenever the expenses arising from the work, together with what had already been incurred and the taxes and other things mentioned in the agreement should amount to ten thousand dollars, the agreement would be satisfied.

Now, it is alleged by the plaintiff that, in the first place, there was a breach of contract in that the defendant did not do this, that he discontinued work after some time—I believe in 1883—and did not thereafter resume it. I assume the parties intended that the work should be prosecuted with some reference to the situation of the property and the circumstances under which it was to be done.
It could not be intended that they should keep right along
90 and never suspend work for any reason whatever, as, to
illustrate, one of the witnesses testified that at one time they
were unable to manage the water there, and the suspension of work was for the purpose of procuring other machinery and such as would be adequate. If that were practicable it must have been within the contemplation of the parties; and so, in work of this kind involving a great outlay, there might be other reasonable grounds for suspending work for a time.

Whether the work was carried on with such diligence as the contract requires—that is to say, with reasonable diligence, having regard to the situation of the property and the difficulty of managing it and carrying on the work there—is for your consideration. If you should be of the opinion, from all that has been stated before you, that the work was reasonably conducted, then the breach alleged in that behalf would not be made out; but if you be of the opinion that it was not prosecuted with reasonable diligence, such as the parties must have contemplated at the time this agreement was made, then, of course, it would be made out.

And in that connection it is rather important to consider the matter with reference to the question which has arisen here in respect to the expense of guarding the property. There is something over a thousand dollars brought in here by the defendant. I do not remember the exact sum, but I believe it was $1,117—something like that—for guarding the property.

Mr. THOMAS: Somewhere in that neighborhood.

91 The COURT: That is a matter for which the defendant could charge only during the reasonable suspension of work. If he was not prosecuting work with that diligence which the contract exacted and required he could not charge for guarding the property during the time for which he failed in that respect.

You understand, of course, that while the work is being actively prosecuted in a mine that the possession that is maintained, the custody of the property in carrying on work, is probably sufficient to protect it from marauders, and so the defendant here is only at liberty to charge in respect to the interest of Edward H. Sumner for such guarding as was done during the times when work was reasonably suspended, in your judgment, upon the property.

(Now, with reference to the question whether there was a breach of the contract, there is another breach alleged.

Some time in 1885, I think, the defendant made a lease of this property to Mr. Jenks, a witness who has testified before you. A question has arisen as to whether that lease was in contravention of the terms of the agreement in a sense that would bring this sum of money due upon making it, and the defendant contends that it was not; but I feel compelled to decide against him upon that. The provision of the contract is, "And if at any time I shall dispose of or sell the one-eighth part of said mining property, then and in that case the said residue of said $10,000," meaning the remainder over and above the amount which should be charged against the interest of Edward H. Sumner, "shall become immediately due and payable to said Edward R. Sumner or his order." I think that making this lease was a disposition of the property within the meaning of that clause, and whatever your 92 conclusion may be in respect to the point as to whether work was prosecuted with reasonable diligence upon the property, I should say that the making of this lease was such a disposition of the property as would make the defendant liable for whatever then remained unpaid of the sum of ten thousand dollars.

Perhaps it is not very important to consider the other question as to whether work was prosecuted with reasonable diligence in view of this one as to the making of the lease, except with reference to the matter of the charge for guarding the property.) That seems to be a question the decision of which you cannot very well avoid. Now, as to the charges that are made against the interest of Edward H. Sumner, there are quite a number of credits upon this contract. I believe this is a copy that is here, and I suppose the endorsements are a copy also, but I do not think there is any question as to their correctness.

Mr. Rockwell: No.

The Court: Whether they embrace all the defendant claims is more of a question. I believe they do not, and so you are to allow whatever the evidence shows to you is properly chargeable as against the interest of Edward H. Sumner, being one-eighth of the whole. This is a general statement which covers the whole matter, excepting as to $64.51, which was obtained in 1884 from the sale of some ore. That sum is one which became due to Edward H. Sumner, as I understand it, and is not embraced in this controversy at all.

If I understand the matter correctly that is a demand by Edward H. Sumner against this defendant and does not come within the scope of this contract at all. So I advise you to leave that out of your calculation; and as to the sum of $237.13, the defendant has presented an instruction that he is entitled to an allowance of $237.13 as against the plaintiff in addition to the amounts testified by the witness Jenks.

I suppose that is a correct proposition. If he has paid any
93 money in here he is entitled to credit for that amount.

As to the question of interest which was discussed somewhat by counsel, I shall advise you that if you put the verdict upon the ground of making the lease the plaintiff can have interest only from the date of the lease, which I believe was July 29th, 1885, but that is a matter for your consideration in the general estimate of damages.

Mr. Rockwell: If they conclude that the breach of the contract occurred by shutting down the mine in 1883 or the first of January, 1884, are we not entitled to interest from that time?

The Court: No, sir; in that case you would be entitled to interest only from the expiration of the reasonable time in which you ought to have resumed work; that would be for the consideration of the jury.

Mr. Rockwell: When there is no question I ask your honor to instruct the jury that shutting down the mine was unreasonable and a breach of the contract.

The Court: I cannot do that; I am going to leave it to the jury as to whether the suspension of work was reasonable or not.

To so much of said instructions as begin with the words "Now, with reference to the question whether there is a breach," &c., and ending with the words "charge for guarding the property," as included in parentheses, the defendant, by his counsel, then and there excepted.

And thereupon the defendant, by his counsel, asked the court to instruct the jury as follows:

1. You are further instructed that the plaintiff is not entitled to any credit for one-eighth of the $64.51 realized on ore in 1884, nor to one-eighth of the $100 received as rent from the Crysolite Company in 1884, for that is money belonging to Edward R. Sumner and not the plaintiff, and no setoff for money due to the said Edward R. Sumner can be made applicable to the plaintiff.

2. The defendant is entitled to an allowance of $237.13 as against the plaintiff in addition to the amounts testified to by the witness Jenks. If you believe from the evidence that such amount as realized from the Buckeye mine was tendered to the plaintiff and 94 that such tender has been kept good by deposit in court as required by law——

3. If the jury believe from the evidence that the only disposal which has been made of the Buckeye claim or any interest therein by the defendant is the lease to George A. Jenks, bearing date the 29th day of July, 1885, and extending for two years thereafter, then you are instructed that the defendant has not disposed of or sold an interest therein within the meaning of said contract, and as to any claim of plaintiff based upon that clause thereof relating to such disposal and sale you will find for the defendant.

To the refusal of the court as to said instruction No. 3 the defendant by his counsel then and there excepted.

And thereupon the jury returned a verdict for 7,390.18 dollars in favor of the plaintiff.

And thereupon the defendant filed his motion for a new trial in words and figures following:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the Eighth Judicial Circuit of the United States in and for said District.

MARY J. SUMNER, Plaintiff, }
vs. } No. 2002.
DAVID K. HILL, Defendant. }

Comes now the defendant, by Paterson & Thomas, his attorneys, and moves the court to set aside the verdict of the jury against 95 him in said cause and to grant him a new trial of the issues therein, and for ground of said motion defendant says:

1. The verdict is contrary to the evidence.
2. The verdict is contrary to the law.
3. The court erred in excluding evidence offered by the defendant and objected to by the plaintiff.
4. The court erred in admitting improper evidence for the plaintiff over the objection of the defendant.
5. The court erred in the instructions given by it to the jury.
6. The court erred in refusing to give the jury the instructions asked for by the defendant.

7. The court erred in other matters and things apparent on the face of the record.

By PATTERSON & THOMAS,
Attorneys for Defendant.

Whereupon plaintiff, by counsel, files a remittitur remitting from the verdict returned the sum of $300.18, and judgment was thereupon given for plaintiff.

Thereupon the court overruled the said motion and rendered judgment on the verdict; to which action of the court in overruling the said motion and rendering said verdict defendant, by his counsel, then and there duly excepted.

And forasmuch as the matters and things hereinabove set forth do not fully appear of record, the defendant tenders this his bill of exceptions and prays that the same may be made a part thereof, and asks that the same be signed and sealed by the judge of this court for that purpose, which is thereupon done this 20th day of March, A. D. 1888.

MOSES HALLETT, *Judge.* [SEAL.]

96 M'ch 19, '88.—Substantially correct.

L. C. ROCKWELL.

Endorsed: 2002. Circuit court U. S. Mary J. Sumner *vs.* David K. Hill. Bill of exceptions. Filed Mar. 20, 1888. William A. Willard, clerk. Patterson & Thomas, att'ys for def't.

And afterwards and on, to wit, the 31st day of March, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Time to File Supersedeas Bond Extended.

MARY J. SUMNER
vs. } 2002.
DAVID K. HILL.

Money demand. Attachment.

At this day comes the said defendant, by C. H. Hartzell, Esq., his attorney, and, on his motion, it is ordered by the court that he have until April 8th next to file herein his supersedeas bond.

And afterwards and on, to wit, the 2nd day of April, A. D. 1888, came again the said defendant, by his attorneys aforesaid, and filed
in said court and in said cause his bond, and sued out of said
97 court a writ of error and a citation to the Supreme Court of
the United States; and the said bond is in words and figures
as follows, to wit:

Bond on Writ of Error.

UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that I, David K. Hill, as principal, and Charles S. Thomas and Charles L. Willoughby, as sureties, are held and firmly bound unto Mary J. Sumner in the full and just sum of ten thousand dollars, to be paid to the said Mary J. Sumner; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of March, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately at the November term, A. D. 1888, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Mary J. Sumner and David K. Hill, defendant, judgment was rendered against the said David K. Hill for the sum of seven thousand ninety and $\frac{18}{100}$ dollars and costs, — having obtained a writ of error to reverse the judgment of said court and a citation directed to the said Mary J. Sumner, citing and admonishing her to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said David K. Hill shall prosecute said writ of error to effect and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

98 (Signed) DAVID K. HILL. [SEAL.]
" CHARLES L. WILLOUGHBY. [SEAL.]
" CHARLES S. THOMAS. [SEAL.]

Approved:
(Signed) MOSES HALLETT, *Judge.*

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Personally appeared C. S. Thomas, who, being first duly sworn according to law, deposes and says that he is one of the above-named sureties and is worth in property not exempt by law from execution or attachment the sum of ten thousand dollars.

C. S. THOMAS.

Subscribed and sworn to before me this 2nd day of April, A. D. 1888.

[NOTARIAL SEAL.] H. J. BAILEY,
Notary Public.

(Commission out M'ch 8, '89.)

Justification.

THE UNITED STATES OF AMERICA, *Northern Dist. of Ill.*, } *ss:*

Charles L. Willoughby, one of the sureties on the within bond, being first duly sworn, deposes and saith that he is worth in real estate the sum below set opposite his name—that is to say, as to real estate, one hundred thousand dollars; as to personal property, twenty-five thousand dollars—over and above all his just
99 debts and liabilities and in property subject to levy and sale upon execution.

(Signed) CHARLES L. WILLOUGHBY.

Subscribed and sworn to before me, at Denver, this 24th day of March, A. D. 1888.

[SEAL.] (Signed) SIMEON W. KING,
U. S. Commissioner in and for the Northern District of Illinois, Residing at Chicago, in the State of Illinois.

Endorsed: Gen. No. 2002. Circuit court of the United States, district of Colorado. Mary J. Sumner *vs.* David K. Hill. Supersedeas bond on writ of error. $10,000.00. Filed this 2nd day of April, A. D. 1888. William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error, with the return of the clerk thereon, is hereto attached, to wit:

Writ of Error.

100 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

[Vignette.]

UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between Mary J. Sumner and David K. Hill, a manifest error hath happened, to the great damage of the said David K. Hill, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Samuel F. Miller, *chief* justice of the Supreme Court of the United States, this 2d day of April, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the 113th year.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT, *Judge*.

100*a* [Endorsed:] Gen. No. 2002. Circuit court of the United States. David K. Hill, plaintiff in error, *vs.* Mary J. Sumner. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 2d day of April, A. D. 1888. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Patterson & Thomas, attorneys for plaintiff in error.

Return.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States, at Washington, D. C., a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 8th day of August, A. D. 1888.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

The defendant having served this writ of error by lodging a copy thereof for the adverse party in the clerk's office within sixty days, Sundays exclusive, after the rendition of the judgment herein, and having given the security required by law on the issuing of the citation, this writ is therefore a supersedeas.

[Seal United States Circuit Court, District of Colorado.]

Teste: WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Rec'd a copy of within this Ap'l 2d, '88.

L. C. ROCKWELL,
Att'y for Mary J. Sumner.

101 And the said citation is next hereto attached, to wit:

Citation.

102 Citation, U. S. — Court.

[Vignette.]

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to Mary J. Sumner, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein David K. Hill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 2d day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

MOSES HALLETT, *Judge.*

103 *Proof of Service.*

THE UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

On this 2d day of April, A. D. 1888, I received a copy of the within citation.

L. C. ROCKWELL,
Att'y for Mary J. Sumner.

[Endorsed:] Gen. No. 2002. Circuit court of the United States, district of Colorado. David K. Hill, plaintiff in error, *vs.* Mary J. Sumner, defendant in error. Citation. Filed in circuit court of the U. S. this 2d day of April, A. D. 1888. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Patterson & Thomas, attorneys for plaintiff in error.

104 [Vignette.]

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein Mary J. Sumner was plaintiff and David K

Hill was defendant, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this eighth day of August, A. D. 1888.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

105 In the Supreme Court of the United States.

DAVID K. HILL, Plaintiff in Error,
vs.
MARY J. SUMNER, Defendant in Error.

Error to the circuit court of the United States in and for the district of Colorado.

Comes now the plaintiff in error and says that in the transcript of the record of said cause there is manifest error, in this, to wit:

(1.) The circuit court erred in overruling the demurrer of the defendant to the complaint of the plaintiff.

(2.) The circuit court erred in sustaining the objection to the question asked plaintiff on cross-examination, at folio 151–'2, "What was the consideration of that assignment."

(3.) The court below erred in refusing to permit the plaintiff in error to show the amount of money expended in the development of the Buckeye property during the continuation of the lease. See folio 175.

(4.) The court below erred in refusing to permit the plaintiff in error to show that no mineral was found during the working of such lease. Fol. 175.

(5.) The court below erred in instructing the jury as follows (folios 183–188):

The contract appears to have been very carefully drawn to provide for the satisfaction of all demands against the interest of Edward H. Sumner out of this ten thousand dollars, and then it was provided that after deducting all the aforesaid sums of money above mentioned, "I hereby agree to pay to said Edward R. Sumner or his order the residue of the said $10,000 out of the first production of my interest in said mine as soon as the same shall be realized therefrom."

Now with respect to that matter, if that were all there was in the agreement, the defendant would only be bound to some reasonable effort to find this sum of money in the mine, and it would be a question whether he had prosecuted work sufficiently to show whether the money could be taken from the mine or not. But there is another provision in the contract which must be regarded as showing that it was the intention of the parties that the work should be prosecuted until the sum of $10,000 should be exhausted in behalf

106 of the interest of Edward H. Sumner, or the ore should be found which would be sufficient to pay the amount which might then be due of the $10,000 after deducting the part which was to be applied to the interest of Edward H. Sumner.

The last clause of the agreement is "in no case am I to pay out more than $10,000 on behalf of said Edward R. Sumner on the one-eighth interest of said Edward H. Sumner, including the $1,308.43 mentioned above." As to the work necessary to be done to satisfy the terms of the contract with a view to take out this money this $10,000, or so much thereof as should not be applicable to the interest of Edward H. Sumner, the contract must be regarded as requiring the defendant to proceed with reasonable diligence in the prosecution of the work until he should have taken out this money or should have expended for the interest of Edward H. Sumner the $10,000. Of course, whenever the expenses arising from the work, together with what had already been incurred and the taxes and other things mentioned in the agreement should amount to ten thousand dollars, the agreement would be satisfied.

Now it is alleged by the plaintiff that in the first place there was a breach of contract in that the defendant did not do this; that he discontinued work after some time, I believe in 1883, and did not thereafter resume it. I assume the parties intended that the work should be prosecuted with some reference to the situation of the property and the circumstances under which it was to be done.

It could not be intended that they should keep right along and never suspend work for any reason whatever, as, to illustrate, one of the witnesses testified that at one time they were unable to manage the water there, and the suspension of work was for the purpose of procuring other machinery and such as would be adequate. If that were practicable it must have been within the contemplation of the parties; and so, in work of this kind, involving a great outlay, there might be other reasonable grounds for suspending work for a time.

(6.) The court below erred in instructing the jury as follows (fol. 189):

Whether the work was carried on with such diligence as the contract requires—that is to say, with reasonable diligence, having regard to the situation of the property and the difficulty of managing it and carrying on the work there—is for your consideration. If you should be of the opinion, from all that has been stated before you, that the work was reasonably conducted, then the breach alleged in that behalf would not be made out; but if you be of the opinion that it was not prosecuted with reasonable diligence, such as the parties must have contemplated at the time this agreement was made, then, of course, it would be made out.

(7.) The court below erred in instructing the jury as follows (fol. 192–'4):

Now, with reference to the question whether there was a breach of the contract, there is another breach alleged.

Some time in 1885, I think, the defendant made a lease of this property to Mr. Jenks, a witness who has testified before you. A question has arisen as to whether that lease was in contravention of the terms of the agreement in a sense that would bring this sum of money due upon making it; and the defendant contends that it was not; but I feel compelled to decide against him upon that. The provision of the contract is "and if at any time I shall dispose of or sell the one-eighth part of said mining property, then and in that case the said residue of said $10,000," meaning the remainder over and above the amount which should be charged against the interest of Edward H. Sumner, shall become immediately due and 107 payable to said Edward R. Sumner or his order." I think that making this lease was a disposition of the property within the meaning of that clause, and whatever your conclusion may be in respect to the point as to whether work was prosecuted with reasonable diligence upon the property, I should say that the making of this lease was such a disposition of the property as would make the defendant liable for whatever then remained unpaid of the sum of ten thousand dollars.

(8.) The court below erred in refusing to give the jury instruction numbered one asked for by the plaintiff in error.

(9.) The court below erred in refusing to give the jury instruction numbered two asked for by the plaintiff in error.

(10.) The court below erred in refusing to give the jury instruction numbered three asked for by the plaintiff in error.

(11.) The court below erred in refusing to grant the motion of the plaintiff in error for a new trial and in rendering judgment upon the verdict.

Plaintiff in error therefore prays that the said judgment be wholly reversed, remanded, and for naught held.

CHARLES S. THOMAS,
THOMAS M. PATTERSON,
Attorneys for Plaintiff in Error.

108 [Endorsed:] Supreme Court of the United States. David K. Hill, pl'ff in error, *vs.* Mary J. Sumner, def't in error. Assignment of error.

Endorsed on cover: Colorado C. C. U. S. No. 1114. David K. Hill, plaintiff in error, *vs.* Mary J. Sumner. Filed September 20, 1888.

[illegible]
JAMES H. McKENNEY

IN THE

Supreme Court

OF THE

United States.

DAVID K. HILL, *Plaintiff in Error,* vs. MARY J. SUMNER, *Defendant in Error.*	*Error to the Circuit Court of the United States, for the District of Colorado.*

BRIEF AND ARGUMENT OF THE PLAINTIFF IN ERROR.

THOMAS M. PATTERSON,
CHARLES S. THOMAS,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1888.

DAVID K. HILL, *Plaintiff in Error,* vs. MARY J. SUMNER, *Defendant in Error.*	*Error to the Circuit Court of the United States, for the District of Colorado.*

BRIEF AND ARGUMENT OF THE PLAINTIFF IN ERROR.

STATEMENT OF CASE.

In the winter of 1879–80, David K. Hill was the owner of a controlling interest in the Buckeye Mining claim at Leadville, Colorado. Edward R. Sumner and his son Edward H. Sumner each owned an undivided one-eighth of the same claim, which prior to the sixth day of March, 1880, had been developed in common by the parties named together with the other owners; but the plaintiff in error had advanced the moneys expended in such development for his own and the Sumner interests, and they were indeted to him in consequence in the sum of $808.43. On the sixth day of March, 1880, Edward R. Sumner sold his one-eighth interest in the claim to the plaintiff in error, who agreed to pay $10,000 therefor, $500 of which was paid in cash, and the credit of $808.43 already due was credited on the amount. An agreement was then entered into between Edward R. Sumner and the plaintiff in error, which appears in full on page 19 of the printed transcript, and which agreement forms the basis of this action.

The plaintiff in error, for the evident purpose of providing against the accumulation of further demands against the interest of Edward H. Sumner and Edward R. Sumner, and for the evident purpose in the event of the further development of the claim on the part of E. R. Sumner of providing for its development in such a way as that no assessments in cash on the interest of Edward H. Sumner should be made or collected, covenanted with Edward R. Sumner that the said plaintiff in error should pay all expenses on behalf of Edward R. Sumner on the interest of Edward H. Sumner which had accrued or might thereafter accrue for the sinking of a shaft on the mine, for machinery purchased in sinking the shaft, and for operating the same until pay mineral should have been reached; also one-eighth of all expense of litigation concerning the title to and possession of the mine, or for trespass which might be committed upon that property from and after the first day of February, 1880; also to pay on behalf of Edward R. Sumner a one-eighth of all other expenses, taxes, or expenses of any name or nature which might justly accrue against it, and which moneys so advanced were to be applied by indorsement upon the contract by Edward R. Sumner or his assigns, in payment of the aforesaid sum of $10,000.

It is quite apparent from the covenants above referred to, that the interest of Edward H. Sumner in the Buckeye Mine was regarded as identical with that of Edward R. Sumner, and that in making the contract the latter regarded the interest remaining in his son's name as practically his own property, or if not his own, then he was to be so far interested in it as to assume the burden of whatever liability might accrue against that interest by reason of the further development of the property.

By the fifth clause of the contract, the plaintiff in error agreed, after deducting all the aforesaid sums of money, to pay to Edward R. Sumner or his order the residue of said $10,000 out of the first production of the interest of the plaintiff in error in the mine, as soon as the same should be realized therefrom, and if at any time he should dispose of or sell a one-eighth part of said property, then, and in that case, the residue of said $10,000 should become immediately due and payable to Edward R. Sumner or his order, it being distinctly understood that in no case was he to pay more than that amount on behalf of Edward R. Sumner on the eighth interest of Edward H. Sumner, including the amount paid and credited at the time of making the contract.

After the execution of the contract, Hill and the other owners renewed work on the mine about the twelfth day of February, 1880, and continued the same until about the sixteenth of January following, when the breaking of the pumps and the consequent flooding of the workings made a stoppage necessary. Work was resumed in October, 1882, and continued until about the first of December, 1883, when it was discontinued on account of the fruitless results up to that time obtained. During this period of development, the plaintiff in error advanced all moneys needed for his own and the Sumner interests, and also looked after and paid the expenses connected with the litigation which became necessary for the protection of the title, and the sums due were credited upon the back of the contract up to the tenth day of October, 1883. After that time and down to the first of December, 1883, the additional sum of $1,445.45 was expended by the plaintiff in error, who also, on the twenty-third of May, 1884, paid the taxes for the four preceding years. The property was guarded during the time when not in active operation, which necessitated an outlay evidently included in the fourth subdivision of the contract.

On the twenty-ninth day of July, 1885, the plaintiff in error and Robert Esser, two of the owners of the claim, made a lease of their interest in the mine to George A. Jenks for the period of two years immediately thereafter, which lease provided that the premises should be worked and developed at the expense of the lessee, who should pay ten per cent. of the net smelter returns on all ores of the maximum value of $20 per ton, and twenty-five per cent upon all ores over that value. Upon the execution of the lease, the lessee began work upon the mine, and afterwards and on the twentieth day of April, 1886, Mary J. Sumner, as assignee of Edward R. Sumner, began this action in the District Court of the County of Arapahoe and State of Colorado, alleging that by the terms of the contract Hill had agreed to pay Sumner $10,000 for his property within a reasonable time, which had expired; and also, that by reason of the making of the lease he had disposed of an eighth interest in said property, within the meaning of the contract, in consequence of which the remainder of the amount specified in the contract was due and payable.

The case was removed to the Circuit Court for the District of Colorado by the defendant, who answered, admitting the execution of the contract and the making of the lease, alleged the development of the property, together with the reasons for discontinuing, as well as the reasons for making the lease referred to. A demurrer was interposed to the complaint, which was overruled by the Court, its determination being, in effect, that the making of the lease was a disposition of the property within the meaning of the contract between the parties.

The case came on for trial on the sixteenth day of January, 1888, and resulted in a verdict for the defendant in error for $7,390.18, $300.18 of which was remitted before judgment was rendered, and judgment then given for $7,090.

The instructions given by the Court to the jury constitute the chief errors which have been assigned for consideration here, although we think one at least was made in the rejection of the testimony offered by the plaintiff in error. The Court, in effect, told the jury that in the making of this contract, the parties intended that work should be prosecuted by the plaintiff in error with reasonable diligence; that is to say, that it was the intention of the parties that work should be prosecuted until the sum of $10,000 should be exhausted in behalf of the interest of Edward H. Sumner on the ore to be found, which would be sufficient to pay the amount which might then be due, after deducting the part which was to be applied to the interest of Edward H. Sumner. The jury was also told that it was its province to determine whether the work had been conducted with reasonable diligence, and that if it had not been with such reasonable diligence as the parties must have contemplated at the time the agreement was made, the plaintiff's case would be made out.

The jury was also told that the making of the lease was in contravention of the terms of the agreement in such sense as would bring the money due upon making it, in consequence of which it became unimportant for it to consider the question of reasonable diligence, except with reference to the matter of the charge for guarding the property. Exceptions were duly taken to the charge so given and afterwards emphasized in the motion for a new trial, which was overruled.

The plaintiff in error by his counsel requested the Court to charge the jury that if it believed from the evidence that the only disposal made of the Buckeye claim, or any interest therein, by the defendant, was the lease before referred to, then the defendant has not disposed of or sold any interest therein within the meaning of the contract, and that as to any claim of plaintiff based upon that clause, the finding should be for the defendant. The request was refused, and refusal excepted to.

ASSIGNMENT OF ERRORS.

They are eleven in number, but the consideration of the first, tenth and eleventh is involved in the fifth, sixth and seventh. The third and fourth are the only others which demand discussion.

ARGUMENT.

The answer of the plaintiff in error alleged the reasons for discontinuing work, and also those which prompted the making of the lease, together with the fact that large sums of money had been expended by the lessee, which but for said lease, would have constituted a charge *pro tanto* upon the interest of Edward H. Sumner. That part of the answer stood against the motion to strike out, and was properly a subject of proof, and since the contract provided that the plaintiff in error should pay Sumner all moneys realized by him as profits upon ores taken from the mine, it was desirable to show that no such moneys had been realized either by himself or through his lessee. It is true that no claim was made in the complaint that money had been realized from the mine, although it was averred that ore was being mined from it when the contract was made, yet if the efforts of a lessee, like those of the plaintiff in error, had proven abortive that fact should have gone to the jury in connection with other facts bearing upon the reasons which actuated the plaintiff in error in shutting down the mine, for the case was brought and tried upon the assumption that the contract was one which, among other things, imposed an obligation upon the plaintiff in error to work the mine continuously until he had expended eight times as much money as was specified in the contract, although, as we shall contend, no such oligation appears from the instrument itself.

Another reason why the testimony concerning the expenditures of the lessee should have been admitted is that the jury should have known the extent of benefit derived by Edward H. Sumner from the lease. The plaintiff in error, in making the lease, deprived himself of the power to charge his lessee's expenditure to the extent of one-eighth against the remaining Sumner interest, which interest derived its proportionate benefit from the work of the lessee, notwithstanding it was not included in the lease itself; and if the plaintiff in error, by adopting that method of securing development of the property, relieved the plaintiff of a burden of expense otherwise resulting from the contract, the act, instead of being construed to his disadvantage, should be regarded from an absolutely contrary point of view.

The position assumed by the plaintiff in the Court below, as well as by the trial Court, was that the defendant had become liable under the contract to the plaintiff by eason of two things; first, a covenant to work the property to pay mineral within a reasonable time, which he had failed to do; and second, the making of the lease which virtually amounted to a disposition of the property under the contract. The plaintiff alleges in her complaint that at the time the contract was signed and delivered, the owners of the lode were working the same with a view of developing the property and were mining and taking ore therefrom, and that it was the intention of Edward R. Sumner and the defendant, that the mine should be worked continuously and with reasonable diligence by Hill until enough money was realized by him to pay the balance of the purchase money. It is also averred that after the month of April, 1883, the defendant failed to work the mine but kept the same idle, in consequence of which, the remainder of the amount specified in the contract had become due. These allegations having been sustained by the Court after demurrer filed, the answer denies that any ore had been taken from the mine before or at the time when the contract was made, and denies the intention set forth in the complaint. The answer also denies that the mine was not worked as required by the contract. Testimony in support of the plaintiff's allegations last referred to is wholly wanting; but the Court, as before stated, instructed the jury in effect that by the contract the defendant had bound himself to work the mine with reasonable diligence, and if work was not prosecuted by him with such diligence, as the parties must have contemplated at the time the agreement was made, then the defendant should be held liable.

We contend that this construction is doubly defective. It assumes that the defendant had contracted to work the property with reasonable diligence and it then leaves the question whether the contract was performed within a reasonable time, to be determined as a question of fact by the jury.

As to the first branch of this error, we contend with the utmost confidence that there is nothing in the body of the contract which commits the defendant to the prosecution of constant work, or of any work at all, and since no evidence was introduced upon the question of the intention of the parties, such intention must be gleaned from the language employed by them in framing their agreement. If, now, we turn to that agreement, we find that all that the defendant covenanted to do was to pay the $10,000 for an eighth of the Buckeye claim, in a certain manner. He first paid $1,308.43; then he agreed to pay all expenses on behalf of Edward R. Sumner which had accrued or which might accrue on the eighth interest of Edward H. Sumner for sinking the shaft, for all machinery purchased, and for operating the same until pay mineral should have been reached. He agreed thirdly, to pay one-eighth of the whole of the expenses of litigation regarding the title to or possession of said property, and fourthly, he agreed to pay one-eighth of all assessments, taxes and expenses of every name or nature which might justly accrue against the said interests; and lastly, after deducting such sums, he agreed to pay Edward R. Sumner the residue out of the first production of his interest therein as soon as the same should be realized, with the proviso that if at any time he should dispose or sell an eighth part of that property, then the residue of said $10,000 should become due and payable to Edward R. Sumner. To what part of this contract must we go in order to find a covenant on the part of the plaintiff in error to work the property continuously or at all?

It is a cardinal principle of construction that an agreement shall be reasonable and shall be interpreted according to the intention of the parties. Another principle is, that the meaning of the parties is to be gathered from the four corners of the instrument, which is to be taken as an entirety; and still another, that nothing is to be imported into the contract not justified by the language employed in its framing. The defendant Hill was the owner of a large interest in the mine. The two Sumners each owned an interest, while other interests were held by outside parties. The property, up to the time when the contract was made, had been explored without result. Can it be said that the defendant ever intended, or that anything in the language employed, justifies the proposition that he ever intended to bind himself to the expenditure of $80,000 in the search for mineral ores, and which money must be expended continuously, or until the thing searched for was found? Would any reasonable man ever have consented to make such a contract? Would he not have been far more likely to have paid the $10,000 at once and be done with it forever? Must he have performed such a condition notwithstanding the other owners had refused or declined to join him.

We admit that as the owner of a controlling interest in the property, it was reasonable to suppose that the plaintiff in error would continue, to some extent at least, the work of development. We assume that he was ready to advance his proportion therefor at any time, but to hold that where two of a number of owners of a mining claim make a contract between each other, by means of which one purchases a part of the others interest and agrees that a part of the consideration shall consist in paying the vendor's proportion of expenses incurred by reason of the ownership of his remaining interest in the property, such contract necessarilly implies an obligation on the part of the vendee to continue to prosecute work upon the property, would be to import a consequence to the obligations of men not dreamed of by them at the time of their contract.

The conduct of the defendant in error is of itself a complete refutation of the assertion that it was intended when the contract was entered into that the plaintiff should prosecute work continuously. The defendant in error is the wife of Edward R. Sumner, and he is the real party in interest by another name. According to the evidence, work ceased upon the property on the first day of December, 1883. The suit was not instituted until April, 1886. The plaintiff waited before before bringing suit until the execution of the lease; hence, we are justified in concluding that, conscious of the fact that there had been no agreement upon the part of the plaintiff in error to do any work, something more was necessary before an action could be instituted at all. The making of the lease, and not a failure to prosecute work, was the motive which inspired the bringing of the suit. The allegation of reasonable time was simply thrown into the complaint as a make-weight, and hence we assert that by her own conduct the defendant in error is estopped from asserting the existence of any such intention. There being then, no covenant to prosecute work upon the property either in express terms or by implication, the Court erred in charging the jury that such a covenant existed.

But even were such a covenant in the contract, it certainly was not the province of the jury to determine whether it had been broken. Since no particular time for performing such a covenant was specified, a reasonable time was said to be implied. Now it is a cardinal principle that if A is to perform a covenant with B within a reasonable time, and B brings suit for its non-performance, he must show that a reasonable time has elapsed, and whether the proof presented by him does or does not establish his position, is simply a question of law. As laid down by the text writers, "If a contract specifies no time the law implies that it shall be performed within a reasonable time, and what is a reasonable time is a question of law."

2 Parsons on Contracts, 662.
Atwood vs. Clark, 2 Greenleaf, 249.
Hill vs. Hobart, 16 Me., 164.
2 Chitty on Contracts, 1062, Note U.
1 Sugden on Vendors, 417, Note T.

The instruction was vicious for the additional reason that it enabled the jury to fix the very time when the work ceased as the time when the contract should have been fulfilled and the $80,000 expended. We think that even if the question was one fairly deducible from the contract, and even though it was the province of the jury to determine the question, yet they should have been told that if the defendant failed to recommence his work within a reasonable time, he would be liable. We can only estimate the time fixed by the jury by a computation of the amount of damages which it returned, and from that computation we are driven to the conclusion that it selected the first day of December, 1883, as the time. It probably allowed a credit of one-eighth of the sums expended by the plaintiff in error for October and November work, together with one-eighth of all taxes due to date, and then calculated interest at ten per cent. per annum from that date. This makes, substantially, $7,390 the amount of the verdict. This is manifestly wrong, since no time was allowed the defendant between the date of shutting down and the period when, to have exercised reasonable diligence, he should have recommenced.

The Court below partially recognized the force of our position when in answer to a question asked by Mr. Rockwell, it said that the plaintiff would be entitled to interest from the expiration from the reasonable time in which work should have been resumed. This was not supplemented by the statement that some time would necessarily have to elapse in order that the question of reasonableness might arise at all, and therein consists our complaint. There being, then, no covenant in the contract that he should perform the work, and consequently no question of its performance in a reasonable time, and the Court having, notwithstanding this fact, found the existence of one and submitted the determination of the other to the jury, we are justified from our construction of the verdict not only in asserting that this was the commission of serious error, but that such error resulted in the rendition and verdict of a judgment against the plaintiff in error. Had the jury been told that the plaintiff in error should have begun work within a reasonable time after it ceased, and that it was for them to determine when such work should have been resumed in order to exempt himself from liability under the contract, such charge, while erroneous would at least have allowed the plaintiff in error the benefit of the credits to which he was entitled for guarding the mine while not in operation. As it was, such credits were not to be given unless it should be found that he had worked the property with reasonable diligence and the fact that he even allowed no such credits and consequently held to have unjustifiably ceased work on the first day of December, A. D. 1883, is manifest from the amount of the verdict rendered.

But the Court not only incorporated into the contract a covenant never placed there by the parties, and then told the jury to pass upon the question of reasonable diligence in its performance; it also decided that by the execution of a lease the plaintiff in error had so far disposed of the property as to give the defendant in error an immediate right of action for all sums of money remaining unpaid and specified therein. It did this in its overruling of the demurrer to the complaint which, under the provisions of the Colorado Code of Practice, so far as the demurrer attacked the complaint for insufficiency, is not waved by the filing of an answer, and repeated the error by instrncting the jury in effect that it had little to do beyond determining the question of the amount for which it should return its verdict.

The instruction here complained of is as follows:

"Now, with reference to the question whether there was a breach of contract, there is another breach alleged. Some time in 1885, I think the defendant made a lease of this property to Mr. Jenks, a witness who has testified before you. A question has arisen as to whether that lease was in contravention of the terms of the agreement, in a sense that would bring this sum of money due upon making it; and the defendant contends that it was not, but I feel compelled to decide against him upon that. The provision of the contract is: 'And if at any time I shall dispose of or sell the one-eighth part of said mining property, then and in that case the said residue of said $10,000,' meaning the remainder over and above the amount which should be charged against the interest of Edward H. Sumnear, 'shall become immediately due and payable to said Edward R. Sumner, or his order.' I think that making this lease was a disposition of the property within the meaning of that clause, and whatever your conclusion may be in respect to the point, as to whether work was prosecuted with reasonable diligence upon the property, I should say that the making of this lease was such a disposition of the property as would make the defendant liable for whatever then remained unpaid of the sum of $10,000."

Our contention is that the Court erred in construing the making of this lease to be a disposition of the property within the meaning of the contract. This makes it necessary to ascertain, if we can, the meaning of the word "dispose," as used in the contract, for in no case could the lease be considered as a "sale" of the property. Those cases which have discussed the meaning or considered the legal effect of the word "dispose," have given it as they have given every other word of general use in the law, various meanings, according to the manner in or occasion upon which it has been employed. It has received no fixed technical construction, and like every other word of the contract, therefore, should be given the meaning which was evidently intended by the parties making the contract. Used in connection with property, it has been construed on more than one occasion. Thus, Lord Hardwicke held that the word "dispose" did not mean to sell or convey property, but simply meant the investment and mangement of it to the best interests of certain devisees under a will.

Sheffield vs. Lord Orrery, 3 Atkyns, 286.

This Court has declared that the word "dispose" has a much wider meaning than the word "sell." In the language of Justice Bradley: "The expression 'to dispose of' is very broad and signifies more than 'to sell.' Selling is but one mode of disposing of property."

Phelps vs. Harris, 101 U. S., 380.

These two decisions probably determine nothing beyond the fact that there is no strict technical definition yet attached to the word. It is evident from the instruction quoted that the Court below based its construction upon the ordinary and accepted meaning of the word, since there was no attempt made by either party to obtain for it any strained or technical construction. That is to say, the Court evidently meant that property dependent upon any condition as to the sale or disposal of it would be subject to such condition in case the property should be leased. This was intended by the Court as a general proposition, whereby we claim the error was committed; for some regard should have been had for the general nature of the contract in controversy, and the situation of the parties in relation to it.

The defendant had bought from the plaintiff's assignor a one-eighth interest in the mine, agreeing to pay the sum of $10,000 therefor in a certain way, the payments to be made from time to time as work was done upon the property by him, or as profits should be realized from it, and he was compelled to expend money for the work; but in case at any time he disposed of or sold the property, whatever balance remained due was to be paid at once. E. H. Sumner, son of the vendor, retained an interest equal to that purchased by Hill, and the $10,000 paid for the interest sold by him to Mr. Hill was to be applied in payment of the assessments upon the son's interest. So long as the property was worked by Mr. Hill and the other owners of the mine with no ore discovered, and they were at a constant and certain expense, and young Sumner was compelled to stand his share. The record shows that from the time the contract was entered into by Mr. Hill until the bringing of this suit, he expended something over $12,000 in development and other work, the younger Sumner's portion of which had been credited upon the contract up to October 10, 1883. The evidence further shows that the mine had not produced anything worth mentioning, and the parties were still at a dead loss in working it. As is well known in the development of mines in all mining localities, the leasing of them for a certain royalty or percentage upon the product is a common and general practice. If a mine is not producing it results in benefit to the owner, in that he secures its development at little or no expense to him, and he gets a full, fair and equitable share of any ore which may be discovered. The testimony shows that Mr. Hill had left the mine in charge of the witness, Jenks, who had absolute control of it before and since the making of the contract with Mr. Sumner; and that, finally discouraged by his failure to find any mineral, compelled continuously to pay out money for its development, he leased his interest to Mr. Jenks upon terms advantageous to all the owners. There was really no practical change in the possession, the mine having been practically in charge of Mr. Jenks during all this period, and the fact that during the continuance of this lease Mr. Sumner would be exempt from the burden of any assessments upon the one-eighth interest mentioned in the contract for the development of the mine, made it beneficial to him, to say nothing of the fact that work was to be prosecuted vigorously on the mine by the lessees, he to have Hill's profit on whatever they might discover. The contract was entered into by all parties with full knowledge of this custom and method of working mines, so that if there is anything in it which would lead the Court to give a meaning to the word "dispose" different from that which it generally bears, these facts would themselves incline to the view which we insist is the correct one.

We feel that even were there decisions sustaining the position taken by the Court below, these considerations should outweigh any strained or technical meaning which might have been attached to the word.

Referring now to the authorities generally, we find that they are in favor of the position we contend for. We understand the decision of the Court below to have been based principally upon the case of

U. S. vs Gratiot, 14 Peters, 526,

where it was held that the power of Congress to dispose of public lands was not limited to a sale but included the leasing of them. But a consideration of this with other cases to be cited, will show that it is not applicable. We do not dispute the proposition that the phrase "dispose of" as a general one, does not include the power to lease. The point that we make is that the use of the word "dispose" in connection with the word "sale" as it is used in the contract, means some such disposition of the property as will result in an alienation of the title. Leasing land is a "disposition" of it, if at all, only to a limited or circumscribed extent, but not such an one as comes within the meaning intended by the use of the word "dispose" in this contract.

Sumner's fear was that defendant might so "dispose of" the title to the mine that he could escape the payment of the sum mentioned; for example, by making a gift of it to some other person, by giving an interest to some one who in consideration thereof could sink the shaft to "pay mineral," or by forming a corporation and putting the title in its name interpose it between himself and Sumner. This would be a sale in effect if not technically. To guard against this the plaintiff's assignor provided for the maturity of his claim by the doing of any act which should divert the title and substitute some other name upon the record.

We will first call attention to those cases in which the Courts have passed directly upon the meaning of the word "dispose," and then to those where its definition has been incidentally considered.

The Supreme Court of Iowa in the case of the city of Dubuque vs. Miller, 11 Iowa, 583, has discussed the word quite exhaustively. There the question arose as to the power of the city of Dubuque to lease certain real estate. By its charter the city was empowered to receive, hold and convey real estate, but no real estate was to be *disposed of or sold* without the consent of the majority of the legal voters first obtained at an election held for that purpose. The Court held that this latter clause referred to alienation of title and did not extend to the leasing of real estate, Wright, Justice, saying: "We are of the opinion that the words 'dispose' and 'sale,' as used in the sub-division referred to, are not to be construed as claimed by appellant, This inhibition of the power of the Council to dispose of and make sale of the real estate of the city has reference to transactions which shall result in parting with the title and vesting it permanently and entirely in another." This doctrine was affirmed in Middleton Savings Bank vs. City of Dubuque, 15 Iowa, 394, where it was held under the same circumstances that the city had the power to execute a mortgage without first submitting the question to the qualified voters of the city.

These two cases are, we think, conclusive of the point.

The Court of Appeals of New York has, in effect, made the same decision. It was there held that in a lease

Livingston vs. Stickles, 7 Hill 253

for lives where it is covenanted and agreed by and between the parties that it shall be lawful for the lessee, his executors, administrators or assigns to *sell or dispose of* his estate in the premises provided they should first obtain the written consent of the lessor, his heirs and assigns, and pay to him or them on every such sale or assignment the tenth part of the purchase or consideration money for which the premises were sold, and the lessee afterwards contracted to sell the premises indemnifying against the lessor's claim for a tenth of the proceeds of the sale, and the purchaser went into possession under the contract, paid the principal part of the purchase money to the lessee, but received from him no actual transfer of title, yet the lessor's right to be paid the tenth of the sale was incomplete, the lessee not having parted with his legal interest in the premises, the Court laying down the proposition that in general a covenant or condition restraining the right of assigning or selling the right of lease-hold property is not broken by any act of the lessee *which falls short of divesting his legal estate.* The Court, in this case, construed the words "sale" and "dispose" to mean alienation of title, and this is the construction which we contend should be given the words in the case at bar. The case just cited is fully supported by the following New York authorities:

Jackson vs. Silvernail, 15 Johnson, 277.
Jackson vs. Harrison, 17 Johnson, 66.
Edwards vs. Insurance Co., 21 Wen., 494.
Elston vs. Schilling, 42 N. Y., 79.

There are two leading English cases which are instructive in this connection, although neither of them directly defines the word "dispose," one of them is

Crusoe vs. Bugby, 3 Wilson, 234, also
Reported in 2d Wm. Blackstone, 776,

where it is held that where a lessee for twenty-one years covenanted not to *assign, transfer or set over, or otherwise* *do or put away* the premises or any part thereof without permission, and he made a lease for fourteen years, this was not a breach of the condition, all of these words referring to an alineation of the title. The other is

Doe vs. Hill, 4 Dowl. and Ryl., 226.

The words used in the lease were "*let, set, assign, transfer, set over, or otherwise part with the said messuage*," and these were also held to mean assign.

These cases show that in nearly all conveyances and covenants, drawn either by attorney or by parties, it is customary to insert many words which are practically synonymous, such as "sell, assign, transfer, set over, deliver, convey," all of which practically mean the same thing, to-wit, parting with the title. Some of them are broader than others. Some mean parting with it in a particular way, others in some other manner, and this is the way in which we contend that the word "dispose" was inserted and intended to be understood in this contract. It means a parting with the title in any manner, while the word "sell" covers a conveyance of it for a valuable consideration paid or to be paid. See

Hargrave vs. King, 5 Ired. Equity, 430.
Church vs. Brown, 15 Veasy, 258.
Rogers vs. Goodwin, 2 Mass., 475.
Beard vs. Knox, 5 Cala., 252.

The decision of this Court in the case of

Phelps vs. Harris, 101 U. S., 370,

is a practical adjudication upon the proposition. The Court, in determining what is included in the words "to dispose of," practically holds against the meaning given to them by the Court below. The whole decision shows that in their ordinary sense they mean some transfer of property by which the legal title is changed. All of these cases are direct adjudications adverse to the position taken by the Court below in its instruction to the jury.

There are other authorities in which courts of the last resort, both in this country and in England, have indirectly passed upon the meaning of the word "dispose," but the point was not directly in issue. These are cases in which the courts have passed upon the construction of words claimed to constitute restraints upon rights of alienation of property. Deeds or leases transferring property have frequently contained conditions prohibiting grantees or lessees from "disposing of," or "assigning and disposing of," "aliening or disposing of," or by the use of some similar phrase from alienating the property forming the subject of the contract, and the question of their extent or validity is a matter of frequent adjudication. None of them beyond those before cited have been directed to the meaning of the word "*dispose*," but it has gone without saying that the word was intended to be used in contracts of this kind as synonymous with alienation, and the cases have turned upon the question of its extent as a restriction. Thus, in the following cases, the word "*dispose*," either alone or in connection with other words has been used.

Nichols vs. Eaton, 91 U. S., 716.
Hill vs. Tuffs, 18 Pick., 455.
Walker vs. Vincent, 18 Pa. St., 369.

It is true that a lease might be made of such a character as to be a fraudulent disposition or sale of the property. For example, a lease for ninety-nine years, which in law is less than a free hold, in fact is equal to an estate of freehold for several lives. For example in

Larges' Case, 3 Leonard, 182.

it is held that a lease for sixty years, then for another sixty years, and so on up to two hundred and forty years, was a breach of a covenant not to sell for a certain length of time, and in

Livingstone vs. Stickles, *Supra*.

Chief Justice Nelson says that if the legal title should be retained *for the simple purpose of defeating the condition of the covenant*, the courts would be compelled to give effect to the condition by disregarding the pretended lease or disposal. This reasoning of Mr. Chief Justice Nelson obviates the arguments which might be adduced against the inconvenience of the rule contended for by us; for while it is true that Mr. Hill might have leased the premises for ninety-nine years, it is equally true that he might have leased them for a day or a week. According to the rule laid down by the Court below, the execution of a lease for an hour would have been a violation of the contract, and would have made him liable for the balance of the $10,000 remaining unpaid at the time.

As illustrative of this reflection, we call attention to the two decisions of Lord Kenyon in the Doe vs. Carter, 8 T. R., 57 and 300. Upon the first trial, it was held that giving a warrant to confess judgment was not a violation of a condition against alienation of a lease, while in the second it was proved that the warrant was given with the *intent* of avoiding the condition, and it was therefore declared to be a violation.

This argument is also met with the statement contained in the preceding instruction given by the Court, to the effect that Mr. Hill should proceed with reasonable diligence to the extraction of a sufficient amount of ore to pay Mr. Sumner the $10,000 for his interest, for it would be a question whether, in case Mr. Hill leased the property for a considerable length of time, it would be proceeding with due diligence or not, but we conceive that it would not affect the other branch of the contract as to the disposition or selling of his interest.

The decision of Mr. Justice Miller, while on the Circuit, in which the question arose as to the meaning of the word "control," is instructive in this connection, and indicates that words in restraint of the power to contract or alienate will not be construed against the grantee or covenantee, unless essential to the ends of justice, or required by the evident intention of the parties as gathered from the contract.

Pullman Co. vs. Mo. Pac. R Co., 3 McCrary, 645.

It is noticeable that the parties to this agreement confined the result of a disposition or sale by the plaintiff in error, not merely to the interest owned by him, but to an eighth part of the property. That is to say, if at any time Mr. Hill should sell or dispose of a designated portion of his interest, Mr. Sumner should be entitled to his money. It was assumed by the Court below that since Mr. Hill had covenanted to work and develop the claim with reasonable diligence (which we deny), and since his lease and consequent temporary surrender of his interest disabled him from the performance of his obligation, the plaintiff was entitled to her action and her money was due. If, however, a lease of all his interest was a "disposal" of it, then, under the terms of the contract, a lease for an undivided eighth of it would have produced an identical result. Yet it is apparent from a mere statement of the illustration, that such a lease as that last mentioned would neither have deprived him of possession, nor of the power to perform the other covenants assumed to have been inserted in the agreement.

A mere license as to the eighth or to the whole of the Hill interest would have resulted in an equivalent change of possession to the extent of such license, so that if the construction of the term "dispose of" is to depend upon the character of the possession, something far less than a lease, in legal importance at least, would bring about an obligation under the contract.

It follows then that since a mere lease, if that were to be considered a disposal, of an eighth of the mine would bring about the liability of the plaintiff in error just as completely as a lease of the whole, and that since such a lease could in no wise operate to deprive the plaintiff in error of his possession of the remainder conjointly with such lessee, something more than a lease is necessary to constitute such a disposition of the claim as will give the defendant in error a right to sue for the sum specified in the agreement.

For the reasons assigned we respectfully ask for a reversal of the judgment of the Court below, and submit the cause to the consideration of this Honorable Court.

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Attorneys for Plaintiff in Error.

Supreme Court U. S.
FILED,
JAN. 21 1889
JAMES H. McKENNEY,
CLERK.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

NOVEMBER TERM, 1888.

DAVID K. HILL,
Plaintiff in Error,
vs.
MARY J. SUMNER,
Defendant in Error.

No. 1,114.

Brief and Argument of Defendant in Error.

Two questions are presented by this record, which are:

First—Did Hill violate the contract in such way as to bring the money therein called for due, by closing down the mine on January 15, 1881, and by keeping the same idle and unworked from that date until July 29, 1885, saving and excepting a period of eleven months during the year 1883?

Secondly—Did Hill, by making a lease of the lode to Jenks on the twenty-ninth day of July, 1885, for the period of two years next following the last named date, *dispose of an interest* in said lode in such a sense as to bring the money due under the contract?

Both of these propositions were answered in the affirmative by the jury, and judgment was rendered upon their verdict. If either proposition was properly determined, then the judgment must be affirmed. The contract on which suit was brought is found on page 19 of the abstract, and bears date the twelfth day of February, 1880. The complaint charges (folio 5) that for twelve months immediately previous to the execution of the agreement sued on, plaintiff's assignor and defendant had been working the mine; with a view of developing it, and were extracting and taking ore therefrom. That it was their intention to continue to so work the mine continuously, and with reasonable diligence, until the balance of this $10,000 purchase money due from Hill to Sumner was paid. That on or about the fifteenth of January, 1881, Hill ceased working the property, shut down the mine and kept it idle and unworked from then until July 29, 1885, saving and excepting a period of eleven months during the year 1883.

The contract as a whole, besides many clauses therein, indicates with unerring certainty the parties expected the mine to be worked continuously after the making of the contract, the same as it was before the same was made. The second paragraph thereof provides that Edward R. Sumner would pay all expenses properly chargeable to the undivided ene-eighth part of the mine owned by Edward H. Sumner, which has accrued since the first of February, 1880, and which might thereafter accrue for sinking the shaft upon the mine, for all machinery purchased in sinking the shaft and in operating the same, until pay mineral shall have been reached. The fourth paragraph also provides that Edward R. Sumner should pay all expenses assessed against the one-eighth interest of Edward H. Sumner, of every name and nature which might justly accrue against said property and paid out in pursuance of this agreement, which payments should be applied as a credit upon the contract so far as the payments would go to liquidate the ten thousand dollars. After such expenses, it is recited in the fifth paragraph, "I hereby agree to pay to the said Edward R. Sumner or his order, the residue of the said ten thousand dollars *out of the first production of my interest in said mine*, as soon as the same shall be realized therefrom, and if at any time *I shall dispose of* or sell a one-eighth part of said mining property, then and in that case the residue of said ten thousand dollars shall become immediately due and payable. In no case am I to pay out more than ten thousand dollars on behalf of Edward R. Sumner on the eighth interest owned by Edward H. Sumner including the $1,308.43 mentioned as paid above. The contract was made on the twelfth of February, 1880, the lease from Hill and Esser to Jenks bears date July 29, 1885; therefore between the date of the contract and the lease there were five years five and a half months; during that period of time the mine was only worked by Hill from the making of the contract to May 14, 1880—time three months—when it was shut down and remained so until November of that year, when work was again resumed thereon and continued from then until February 22, 1881—time three months longer. Work was begun again on December 2, 1882, and continued until December, 1883—call it a year, but it was less. When Sumner wrote defendant asking him why the mine was shut down he replied he had spent a good deal of money and didn't propose to spend any more. (Folio 78). The longest time that can be credited to Hill in running of the mine does not exceed one and a half years out of five and a half. That certainly can not be treated as working the mine with reasonable diligence. The new machinery put in in 1884, for aught appears, was sufficient to handle the water. The mine was shut down in 1883, as Jenks says, because defendant was discouraged at the prospect as to mineral. (Folio 84).

One of plaintiff's positions is that defendant might work this property and could consume the balance of the ten thousand in paying assessments upon the eighth part owned by Edward H. Sumner, if it was necessary to do that amount of work before pay mineral was found, but he could not suspend work for an unreasonable length of time and say the balance of the purchase money was not due. Another point is, under this contract Hill was bound to pay that money within a reasonable time, even though he continued to work the mine and failed to realize anything therefrom. The language of the contract is, after speaking about the assessments which might be made upon the interest of Edward H. Sumner, payments of taxes and similar expenses: "*Fifth.* And after deducting all the aforesaid sums of money above mentioned I hereby agree to pay to Edward R. Sumner or his order out of the first production of my interest in said mine, so soon as the same shall be realized therefrom." Under this language Mr. Hill could not take his own time in the payment of the balance of the purchase money. It was all due within a reasonable time after the making of the contract. For this view of the case I invite attention to a few adjudicated cases.

In Sears against Wright, 24 Me. 278, the Court construed an instrument reading as follows:

> "BANGOR, June 15, 1836.
>
> "For value received, we promise to pay to Silas Sears, $233.96 from the avails of the logs bought of Martin Mower when there is a sale made.
>
> "WINSLOW, WRIGHT AND COMPANY."

To mean that the makers had to pay that note within a reasonable time, whether the logs were sold or not, the action thereon was brought in June, 1841. The Court remarks: "The plaintiff failed to prove the logs had been sold, but relied upon the lapse of time between the date of the note and the bringing of the suit. Defendant proposed to show he endeavored to sell the logs, but was unable to do so. He then undertook to manufacture the logs into lumber and sell it, which was done with the knowledge and consent of the plaintiff, but in doing so lost over fifteen hundred dollars. The defense attempted to prove that it was the understanding that if the money was not realized out of the logs the note was not to be paid. Defendant's contention was that the note was to be paid from a particular fund. On the contrary, plaintiff's contention was that the fund from which the money was to be derived had reference merely to the time of payment." The Court, speaking by Whitman, C. J., says: "The Court did right in rejecting the testimony offered. * * * By the terms of that contract it can not be inferred that plaintiff had consented to subject himself to any such contingency (as the selling of the logs). His agreement was to wait until the logs could be sold. That is, defendants had a duty to perform; they were bound to sell the logs, and to do it within a reasonable time. The note reads that the money shall be paid 'from the avails of the logs.'" No such language can be found in this contract. It reads: "I hereby agree to pay to the said Edward R. Sumner, or his order, the residue of the said ten thousand dollars out of the first production of my interest in said mine, as soon as the same shall be realized therefrom."

Again, DeWolf against French, 51 Me., 420, was an action for commission in obtaining freight for a vessel. Services were rendered upon the agreement that plaintiff should wait for his pay until the vessel for which the freight was obtained returned with a cargo. The vessel was lost at sea, and never returned. The Court says: "If the parties intended the debt shall be absolute, and fixed upon a future event as a convenient time for payment merely, as where a drover purchases cattle and promises to pay for them on his return from market, overlooking the contingency that he may never return, then the debt will not be contingent; and if the future event does not happen as contemplated, the law will require payment to be made within a reasonable time."

Crooker *vs.* Holmes, 65 Me., 195, was an action to foreclose a mortgage given to secure the following note:

"POLAND, November 7, 1870.

"For value received I promise to pay to Cyrenus W. Crooker, or order, two hundred dollars, without interest, payable when I sell my place where I now live, in Oxford, Me.

"SETH CROOKER.

"*Witness:* DAVID DUNNE."

Defendant contended the note never became due unless the farm was sold, and hence the mortgage could not be foreclosed. The Court, by Appleton, C. J., says: "The debt is due in *precenti;* its payment is postponed to a future time, but the debt nevertheless exists. The debt is absolute, the time of payment indefinite. If a party puts it out of his power to perform his contract his liability at once accrues. It matters not whether by his neglect this be so, or whether it be intentional." In this case defendant suffered a judgment to go against him, which became a lien upon the farm, and the mortgage and the judgment equaled the value of the farm, and he could not sell. Nothing but labor and the expenditure of money would bring the balance of the purchase money due from Hill to Sumner. The former says: "I will not work the property, and then I will not have this money to pay, because it will not be produced from the mine." Certainly, he did not occupy such a favorable position towards his creditor.

Again, Ubsdell *vs.* Cunningham, 22 Mo., 124, was an action founded on the following instrument:

"NEW YORK, March --, 1849.

"Due Messrs. Ubsdell and Pierson one hundred dollars, to be paid over to them as soon as collected at Poughkeepsie, now in the hands of Horace B. Porter, of that place.

"(Signed) H. D. CUNNINGHAM."

"Due Messrs. Ubsdell and Pierson, $34.63 for goods purchased of them while at Poughkeepsie, to be paid as soon as collected from my accounts at Poughkeepsie. New York, March 7th, 1849.

"(Signed) H. D. CUNNINGHAM."

It was shown the accounts mentioned had not been collected, and some of them were not collectable. The Court instructed the jury to find for the defendant, but upon appeal the Supreme Court ruled that the language "to be paid as soon as collected from my accounts at Poughkeepsie," in the other instance, "to be paid as soon as collected at Poughkeepsie, now in the hands of H. B. Porter of that place," ought to be understood merely as prescribing the time of payment by indicating the fund out of which the debtor expected to pay, and thereby securing to him the delay necessary to render it available. Both notes contained a direct acknowledgment of an indebtedness, and did not make the payment of the money conditional, and that all the money having been collected upon these accounts that could be collected the defendants were bound to pay the debt within a reasonable time.

Capron *vs.* Capron, 44 Vt. 412, was an action upon a note reading:

"BRANDON, March 14, 1868.

"For value received I promise to pay Barzillai Davenport or bearer $75, one year from date, with interest annually; and if there is not enough realized by good management in one year, to have more time to pay, in the manufacture of the plaster bed on Stearns' land.

"(Signed) S. A. CAPRON."

The court ruled it was a promise to pay within a year from its date. But if by good management the money could not be realized in that time, then the maker was to have more time in which to pay. The only uncertainty there is about it is the length of time that the maker shall have to pay in after the expiration of the year, in case he does not realize enough from the plaster bed to enable him to pay within a year; and this uncertainty the law makes certain by giving him a reasonable time thereafter to make the payment. And what is a reasonable time is to be determined by the triers from the proof, like any other fact.

The following note was held by the Supreme Court of Iowa to be payable within a reasonable time after the date of the note:

"On demand after date I promise to pay to the order of Niles Works, $2,512.87, payable at Cincinnati, when convenient.

"(Signed) —— Hershey."

Works *vs.* Hershey, 35 Iowa, 340.

Again, Ramot *vs.* Schotenfels, was a prommissory note due in thirty days. It not being paid, the parties put upon the back the following agreement: "Renewed for an indefinite time, at ten dollars interest per month, and the whole amount to be paid when both parties might agree." Defendant contended the note was never payable unless the parties so agreed, and made the note optional with defendant whether he would pay or not; that the renewal was an agreement not to sue. The court construed it to be an agreement not to sue for a limited time. "The presumption is that the parties intended to act fairly and honestly * * * * but that the day of payment was fixed at a reasonable time."

15 Ia., 427.

In support of the doctrine contended for, I further cite the case of Branin *vs.* Henderson, 12 B. Monroe, 61, which was an action upon an accepted order reading.

"I will see the within paid eventually." The Court ruled that to be an undertaking to pay forthwith.

Also, in Haggin *vs.* Williamson, 5 Monroe, 9, in which Haggin undertook to purchase for Williamson a house and lot. Until he did purchase one, he was to furnish her a dwelling, but in the agreement it was provided that Haggin was not to be hastened in making the purchase. He not acting, an action was brought to compel him to purchase, and the Court held, if he would not voluntarily agree to purchase he could be judicially hastened so to do.

Lynn and others *vs.* Butler and others, 8 Colorado, 355, was an action brought upon a contract of sale similar to the one at bar, where the purchase money was to be paid only out of the net proceeds received from the sale of ore taken from the American mine by defendant, which net proceeds were to be derived from the undivided one-fourth interest of said mine. The contract, like this one, provided, "In case of a sale by said second parties of said interest, then, and in that event, said $5 000 shall at once become due and payable." Another claim, called the Little Sliver, conflicted with a portion of the American claim. Defendants compromised the dispute by allowing the Little Sliver owners to obtain a patent, and then receiving from them an eighth interest in the consolidated property. The Court ruled, defendants so far violated the contract as to bring the money due when they allowed the management, in the working of the mine, to pass into other hands, and to allow the American title to become merged in that of the Sliver. That under the contract plaintiff Lynn had the right to believe, when he made the sale, that Butler and Wright would work the mine themselves, and not delegate that right to others, or lose the management and control in working the mine.

Nunez and Company *vs.* Dautel, 19 Wallace, 560, was an action upon the following instrument:

"COLUMBUS, GA., Sept. 1, 1865.—Due Joseph Dautel or order, $1,619.66, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crop can be sold or the money raised from any other source. Payable with interest," and signed by defendants. The Court ruled that, no time having been specified within which the crop should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within a reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned. Upon the occurrence of either of the events named, or the lapse of such time, the debt became due.

It would not be a reasonable construction to say, when Sumner sold his interest to Hill he left it optional with the latter to work the mine only when it suited his convenience to do so. It cannot be said, in view of the fact they had been working it for a long time prior to the sale, that Sumner intended it should remain idle, but under the terms of that instrument Hill was bound to pay this money within a reasonable time after the making of the contract, and suit not having been brought until over six years and two months after the contract was made, lapse of time, if nothing more, brought the money due.

Now, to the second point; that the making of the lease was such a disposition as brought the money due, there can be but little or no doubt. The language is, "If at any time *I shall dispose of* or sell a one-eighth part of said mining property, then and in that case the residue of said ten thousand dollars shall become immediately due and payable to the said Edward R. Sumner or his order." (Folio 41). Opposing counsel contends that the words "dispose of" mean an absolute sale and nothing less. If so, then why insert the words "shall dispose of?" They should be wholly omitted—which the Court has no right to do. The expression "dispose of" has received a construction by this Court in at least two cases, contrary to what opposing counsel contends is the proper construction in this case. The first is that of the United States against Gratiot *et al.*, 14 Peters, 526, and bears upon the construction of that part of the Constitution which says: "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, or other property belonging to the United States." Under the act of March 3, 1807, whereby the President was authorized to lease certain lead mines then in the Indian Territory for a period not to exceed five years. Under the practice the lessee was compelled to give a bond for the faithful fulfillment of his lease. Such bond having been given, and the lease accompanying the same having been violated, an action was brought on the bond, and the defense was that Congress only had the power to sell these lands, and not the power to authorize the President to lease them, and that the word "disposing" in the Constitution meant selling, and nothing less. But this Court held otherwise, and used this language: "The words 'dispose of' can not receive the construction contended for at bar; that they vest in Congress the power only to sell, and not to lease such lands. The disposal must be left to the discretion of Congress." And this Court, also, in Phelps *et al. vs.* Harris *et al.*, 11 Otto, 370, construed the words "dispose of" to include the power to make partition of lands. There, as here, counsel contended that the words "dispose of" meant "sale," but this Court, speaking by Bradley, J., says: "The expression 'to dispose of' is very broad, and signifies more than sale. Selling is but one mode of disposing of property."

Hill, by leasing in this case, absolutely parted with that property and all control of it, for the period of two years, in consideration of 10 per cent. royalty of the net smelter's returns on all ore extracted running to and including twenty dollars per ton, and all ore running over twenty dollars per ton 25 per cent. of such net smelter's returns. Suppose a rich body of mineral had been found, and enough had been taken out in a month to have paid Sumner the balance of his purchase money, would not Hill have broken his agreement in such a way as to bring the money due, when he put it out of his power to take the money so derived from the mine and give it to Sumner? If it was a violation of the contract by putting it out of his power to pay Sumner had the mine produced enough to pay, it was an equal violation of that contract when he lost control of the mine, even though it did not produce anything.

Turning to counsel's argument, on page 9, he says: "To what part of this contract must we go in order to find a covenant on the part of the plaintiff in error to work the property continuously or at all?" It is not necessary that an express covenant to that effect should be contained therein. If the court can see from the contract that it was the intention and understanding of the parties at the time that this property should be worked, that covenant is implied. No set words are necessary to constitute a covenant. And on page 10 he asks, "Can it be said defendant ever intended, or anything in the language employed in the contract, justify the proposition that defendant ever intended to bind himself to expend eighty thousand dollars in searching for ore?" To which I answer, yes. Sumner agreed to pay one eighth of that sum or ten thousand dollars on a similar interest held by his son, and if Mr. Sumner was willing to expend the whole price of his eighth interest and put it into the development of the mine by paying assessments upon his son's eighth interest (this much Hill bound Sumner to do), was not Mr. Hill equally bound to spend a like sum upon the interest he bought of Edward R. Sumner, and is not that the fair construction to be given to this contract? It is not shown what interest Mr. Hill owned in the property, outside of what he bought from Sumner. Counsel has no right to assume he owned the other seven-eighths; but this court must say that Hill obligated himself to spend as much money upon his eighth interest he bought of Edward R., as Edward R. agreed to expend upon assessments on the eighth interest owned by his son Edward H., and that implies a continuous working of the mine.

A party entering into an agreement which can only be operative by the continuance of a certain existing state of circumstances, there is an implied engagement upon his part that he will not, on his own mere motion, do anything to put an end to that state of circumstances under which alone the agreement can be operative.

1 Add, Cont., Sec. 236.
1 Chitty Cont., p. 89.
Sterling *vs.* Maitland, 5 Best & Smiths, p. 840.

The complaint charges it was the intention of the parties thereto, when this contract was made, to have the mine worked continuously after the making thereof, the same as it was before the contract was executed. (Folio 5.) Defendant, by his answer (folio 31) as to this allegation, says: He don't know what the intentions of Sumner were when he made the contract, but it was not his intention to work it continuously.

A party will be held to that meaning which he knew the other party supposed the words bore, if this can be done without making a new contract for the parties.

2 Pars. Cont., p. 499.

The next point made, that the Court erred in leaving to the jury whether or not Hill worked the mine with reasonable diligence. I asked the court to say to the jury, it was a question of law, and that he did not so work it. If the court erred in submitting that question to the jury, it was an error without prejudice. The Court should have said that as a matter of law; the jury said no more. The jury computed the interest from the 29th day of July, 1885, when the lease was made. This is conceded by the counsel's argument. That was as favorable to defendant as he could expect. If the contract was he should work the claim with diligence, then plaintiff was entitled to at least a year or a year and a half's more interest than she got. There can be no question but what plaintiff was entitled to interest from the making of the lease. We contended she was entitled to interest for a longer period of time, but failed to get it. But it matters not what was said to the jury, or whether they found upon the first proposition submitted to them as to the diligence with which Hill worked the property. If the Court was right on the second branch of the case, that making a lease was a disposition of the property within the meaning of the contract, in such a sense as brought the money due upon it, the judgment must be affirmed.

As to the counsel's authorities on this point.

The case in 11 Iowa was one in which the city of Dubuque assumed to rent a stall in the market for fifty dollars a year. The defense was that such a lease could not be made without submitting that question to a vote of the inhabitants of the city, because the city charter read that the city should not *dispose of and sell* its real estate unless the proposition was submitted to a vote of the inhabitants. The Court ruled that provision did not refer to leasing property, and that is all it did decide. It did not assume to give a construction to the words "dispose of or sell."

Less is said as to these words and what they imply, in the next case cited by the gentleman in the 15th Iowa, 394, and the words "dispose of" are not mentioned by the Court.

Also, the case in 15th Johnson, 277, arose upon a lease. The words used were "sell and dispose of." Such decisions throw no light upon the construction given to the words "dispose of or sell" in this contract.

This Court has said, in Phelps *vs.* Harris, *supra,* that the expression *to sell and dispose of,* may even be construed to mean a disposal by sale; but the words *dispose of* did not imply that the disposition must be by sale, but it might be in some other way. This authority justifies the construction which the Court gave to the words "dispose of" in this contract.

Neither do I find the words "dispose of" referred to in the 17th Johnson, nor 21st Wendall cited by counsel, and the case of Cruso *vs.* Bugby, 3 Wilson, 234, and Doe *vs.* Hill, 4 Dowl, and Ryl, cited by counsel, refer to other words and expressions, and they do not refer to the words "dispose of."

The question is, did not Hill dispose of this property in such a way as to bring the money due when he leased it, and whether something less than a parting and conveying the fee is not a disposing of the property within the meaning of this contract. That it is so, Phelps *vs.* Harris, *supra.*; United States *vs.* Gratiot, *supra.*, and Sheffield *vs.* Lord Orrery, 3 Aikyns, cited by counsel, clearly show.

Respectfully submitted,

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